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Modern American Law

A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law and Procedure, Accompanied by Leading Illustrative Cases and Legal Forms, with a Revised Edition of Blackstone's Commentaries

PREPARED BY

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FIFTEEN VOLUMES

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Modern American Law

BLACKSTONE'S COMMENTARIES

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PREFACE

Almost one hundred and fifty years have passed since the first complete edition of the Commentaries of Sir William Blackstone made its appearance, and still publishers are announcing new editions. Some of the ablest lawyers and judges of England and of the United States have devoted themselves to the study and annotation of this famous legal treatise.

Students of the law everywhere have found it an inexhaustible source of entertainment and enlightenment. No single law book has been so widely read or has exerted so great an influence in imparting a knowledge of the theory, spirit and content of Anglo-Saxon law as Blackstone's Commentaries. It is a book of present and abiding value, a classic of legal literature, still read and studied by lawyer and layman. It is entirely appropriate, therefore, that it should have a conspicuous place in Modern American Law. That it may be in the best possible form for the needs of the present-day reader of law, it has been carefully edited and revised by Professor Henry W. Ballantine of the Law School of the University of Wisconsin. In his Introduction, Professor Ballantine explains his purpose and plan in preparing the present edition.

In this volume of Modern American Law will also be found a complete Cumulative Index of the entire series of volumes. The scope, method and purpose of this Index is fully explained in the note which stands at its head.

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EDITOR'S PREFACE.

BLACKSTONE'S COMMENTARIES.

To vary a simile of Blackstone, the English common law may be said to resemble an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls are magnificent and venerable, but to a great extent useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious though their approaches may be winding and difficult.

The Commentaries on the Laws of England, by Sir William Blackstone, were first given to the world in 1765-69, on the eve of the revolution, which separated us from the mother country. The first volume was published in 1765, the first completed edition in 1769, the year before Blackstone was appointed Justice of the Common Pleas. These celebrated commentaries are based on a series of lectures delivered by Blackstone at the University of Oxford.

His commentaries became at once the portal through which all students entered the mazes of the law, and with marvellous vitality they still hold their own as the one successful attempt to present "a great readable, reasonable book about English law as a whole." Blackstone wrote for the educated public

in general, as well as for lawyers, and by the eloquence and lucidity of his style, made English jurisprudence available as a branch of general culture. Not only is he exact in the statement of legal doctrine, but profound in bringing into perspective the mountain peaks and salient features of the law. The universal use and adoption of Blackstone in the colonies and states of America, as the repository of their own inherited common law, has had the greatest influence in moulding the law and jurisprudence of this country.

Blackstone's Arrangement. Blackstone divided his commentaries into four books:

Book I is entitled "Rights of Persons," which is made to include the theory of the English Constitution and the political relations of magistrate and people; domestic or personal relations; artificial persons or corporations, and the disabilities and incapacities of particular classes of natural persons.

Book II is entitled "Rights of Things," and includes the law of property, real and personal, the law of contracts, and also the law of bankruptcy and administration of estates of deceased persons.

Book III is entitled "Private Wrongs," and includes an account of courts and the judicial establishment, the law of torts and the law of civil procedure.

Book IV is entitled "Public Wrongs," and includes a discussion of criminal offences and accountability for crime; also criminal courts and criminal procedure.

This classification purports to be based on Blackstone's definition of law, as a "rule of civil conduct,

commanding what is right and prohibiting what is wrong." He concludes that the objects of law are Rights and Wrongs, that Rights are either rights in respect to persons or rights in respect to things, and that Wrongs are either public or private.

While Blackstone's definition of law is no basis for classification, and while his use of that definition involves a fallacious confusion between the use of Right as an adjective, with its use as a noun, and while he is led into a false antithesis between Rights and Wrongs, yet nevertheless, true divisions of law underlie Blackstone's arrangement, and they assert themselves in spite of the slender and tangled thread on which they profess to be strung. Blackstone followed substantially Lord Hale's Analysis or classification of law. The order of topics is, however, unfortunate for the ordinary reader, as it places the complexities of constitutional law in the first book, and the difficult and obsolete technicalities of real property in the second book. These topics may well be postponed till the simpler and more elemental subjects of the third and fourth books are considered, and then treated with less minuteness.

The editor has therefore endeavored to arrange the subject matter of the law according to its recognized branches, in a natural order of progress and development from the simplest to the highest and most complex, an idea of which may be gained by consulting the table of contents.

The Common Law divides and differentiates itself into the following cross-sections: (1) The Law of Torts, (2) the Law of Crimes, (3) the Law of Con-

tracts and Obligations, (4) the Law of Property, (5) the Law of Private Relations, (6) the Law of Procedure and (7) Constitutional Law. Under these main heads the whole *corpus juris* (except the bulk of public regulations in statute law) may be duly subordinated, substantially in accordance with the recognized classification and the known titles of the different subjects in text-books and digests. It is believed that these main heads are ultimate, and cannot be further brought together by useful generalization. There are, indeed, what may be termed longitudinal sections, which cut across these fundamental divisions, viz., Equity, Admiralty, Conflict of Laws, Damages and Persons; but which are really subordinate to these cross sections.

The editor has not only entirely rearranged the text into a different order, but he has brought together from various portions of the commentaries matter relating to the same topic. He has also altered, added to, and entirely rewritten certain parts, especially in the law of torts and crimes. His additions are in general indicated thus [ ] by brackets. A great deal of obsolete matter has been cut away, but care has been used to conserve whatever is still valuable.

The path of the reader is rendered easier by the use of black-letter section headings and italicised subheadings, which have been carefully prepared with a view to bringing out in a word the point treated, and furnishing a guide for the reader.

HENRY WINTHROP BALLANTINE

BLACKSTONE'S COMMENTARIES REVISED AND ABRIDGED

BY

HENRY WINTHROP BALLANTINE, A.B., LL.B.*

PART I

INTRODUCTORY TOPICS, GENERAL NATURE, AND SOURCES OF LAW

CHAPTER I.

DEFINITION AND ELEMENTS OF LAW IN GENERAL.

Section 1. Law as a command of external authority.—[In Blackstone's famous definition of law, as *"a rule of civil conduct, prescribed by the supreme power of the state, commanding what is right and prohibiting what is wrong,"* emphasis is laid upon the element in law of command. But is governmental *command* or prohibition of the essence of law? It is surprising to find how many English jurists go far beyond Blackstone in emphasizing this as the characteristic element, and in holding that all law is a positive institution, founded solely on the fiat of the lawmaker. They view the entire body of law as essentially nothing more than a series of commands issued by the sovereign to the subject. For John Austin and Jeremy Bentham law expresses simply coercive force and paramount authority. Unlike Blackstone, they ignore or even deny any ethical content, ny vital relation between law and justice. (See Jethro Brown,

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Austinian Theory of Law, § 610, a consideration of some objections to the conception of positive law as a state command; compared Salmond, Jurisp., § 17; Gray, Nature and Sources of Law, §§ 191, 231; Maine, Early Hist. Instit. 364, 365.) So far as law proceeds from the Legislature, indeed, it is primarily a command, an expression of the authoritative will of the state. But the great mass of legal rules belongs to the common law, which has been evolved by the courts, not issued in the form of commands. Law for the most part does not directly say like the Ten Commandments, "Thou shalt not steal; Thou shalt not kill; Thou shalt keep the peace and perform thy contracts." It is a standard of decision which the courts have found in measuring rights, prescribing redress for injuries and awarding punishments. The state owes its citizens the duty of furnishing them protection in their just rights, and courts are established to guide the force of the state in performing this duty wisely and consistently. As Blackstone says, "Justice is not derived from the king, as from his free gift; but he is the steward of the public to dispense it to whom it is due."]

[Blackstone in his definition seems to consider statutes as the type of law, rather than the common law which may be conceived of broadly as *a system of positive or established justice, giving effect as far as practicable to natural or instinctive justice,*—the due observance of those rights which are essential to the existence and well being of individuals and of society. In cases of an entirely new sort, in the absence of statute or precedent, the law leaves the decision to the judicial sense of justice and public policy. In equity cases there is frequently some scope for judicial discretion as contrasted with positive rules. Most of the rules of decision are to be deduced by a process of legal reasoning from the established precedents, principles and legislative policies of the law; all of which, however, may be supposed to go back ultimately to considerations of individual and social justice, and are to be interpreted, developed and applied with such ends in view. The theory is that the true rule, standard or mandate of the common law, applicable to any case that may arise, always exists and is always discoverable by reason and study from the various recognized sources of law, although not always as yet positively formulated or discovered. This measure of rights and duties is ascertained slowly and

laboriously in moving from precedent to precedent, and applying established principles and policies to new cases as they arise, so that human interests and relations may be harmoniously and peaceably adjusted. State v. St. Paul R. R., 98 Minn. 380.]

[Blackstone uses the term "Municipal" law without any reference to cities, to indicate the law by which the inhabitants of particular states or nations are governed, as contrasted with International Law, which governs the mutual intercourse and furnishes a standard of rights and duties between independent nations. Blackstone is fond of referring to the Law of Nature, an ideal or imaginary system existing in the nature of things and derived from the dictates of natural justice and reason: a conception which originated among the Roman jurists. Pollock, Expansion of the Common Law.]

2. Definition of law analyzed; a rule of civil conduct.— Municipal law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." Let us endeavor to explain its several properties, as they arise out of this definition. And, first, it is a rule: not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason: this has permanency, uniformity, and universality, and therefore is properly a rule. It is also called a rule to distinguish it from advice or counsel, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the law depends not upon our approbation, but upon the maker's will. Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

It is also called a rule to distinguish it from a compact or agreement; for a compact is a promise proceeding from us, law is a command directed to us. The language of a compact

is, "I will, or will not, do this;" that of law is, "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising anything at all. Upon these accounts law is defined to be "a rule."

Municipal law is also "a rule of *civil* conduct." This distinguishes municipal law from the natural, or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbor, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbor than those of mere nature and religion; duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and peace of the society.

3. **Prescribed by the sovereign power.**—It is likewise "a rule *prescribed.*" Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified *viva voce* (by word of mouth), by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed to be publicly read in churches and other assemblies. It may, lastly, be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this,

which is called making of laws *ex post facto* (after the fact); when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action innocent when it was done should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro* (at a future period), and be notified before their commencement; which is implied in the term "prescribed." But when this rule is in the usual manner notified or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he might know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But farther: municipal law is "a rule of civil conduct prescribed by the supreme power in a state." For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

I proceed now to the latter branch of our definition; that it is a rule so prescribed, *"commanding what is right, and prohibiting what is wrong."*

Now in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow, of course, that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights, and to restrain or redress these wrongs. It remains therefore only to consider in what manner the law is said to ascertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

4. Constituent elements of a law.—For this purpose every [complete system of] law may be said to consist of several parts; one declaratory; whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down; another, directory; whereby the subject is instructed and enjoined to

observe those rights, and to abstain from the commission of those wrongs: a third, remedial; whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the sanction or vindicatory branch of the law; whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

Declaratory part. With regard to the first of these, the declaratory part of the municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural duties (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se* (crimes in themselves), such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination to the great Lawgiver, transcribing and publishing His precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.

But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right

of the husband; and our statute law has declared all monopolies a public offense: yet that right, and this offense, have no foundation in nature, but are merely created by the law, for the purpose of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes it must be left to our own legislature to decide, in what cases the seizing another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Directory part. Thus much for the declaratory part of the municipal law: and the directory stands much upon the same footing; for this virtually includes the former, the declaration being usually collected from the direction. The law that says, "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or omit them.

The *remedial part* of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the declaratory part of the law has said, "that the field or inheritance, which belonged to Titius's father, is vested by his death in Titius;" and the directory part has "forbidden any one to enter on another's property, without the leave of the owner:" if Gaius after this will presume to take possession of the land, the remedial part of the law will then interpose its office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

The sanction or penalty. With regard to the sanction of laws, or the evil that may attend the breach of public duties, it is observed, that human legislators have for the most part chosen to

make the sanction of their laws rather vindicatory than remuneratory, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good. For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.

Of all the parts of a law the most effectual is the vindicatory. For it is but lost labor to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your noncompliance." We must therefore observe, that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

Legislators and their laws are said to compel and oblige; not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation; but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty; for rewards, in their nature, can only persuade and allure; nothing is compulsory but punishment.

5. **Moral obligation to obey law.**—It is true, it hath been holden, and very justly, by the principal of our ethical writers, that human laws are binding upon men's consciences. But if

that were the only or most forcible obligation, the good only would regard the laws, and the bad would set them at defiance. And, true as this principle is, it must still be understood with some restriction. It holds, I apprehend, as to rights; and that, when the law has determined the field to belong to Titius, it is matter of conscience no longer to withhold or to invade it. So also in regard to natural duties, and such offenses as are *mala in se;* here we are bound in conscience; because we are bound by superior laws, before those human laws were in being, to perform the one and abstain from the other. But in relation to those laws, which enjoin only positive duties, and forbid only such things as are not *mala in se,* but *mala prohibita* (crimes, because forbidden), merely, without any intermixture of moral guilt, annexing a penalty to non-compliance, here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws: for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing; if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; "either abstain from this, or submit to such a penalty:" and his conscience will be clear, which ever side of the alternative he thinks proper to embrace. Thus, by the statutes for preserving the game, a penalty is denounced against every unqualified person that kills a hare, and against every person who possesses a partridge in August. And so, too, by other statutes, pecuniary penalties are inflicted for exercising trades without serving an apprenticeship thereto, for not burying the dead in woollen, for not performing the statute-work on the public roads, and for innumerable other positive misdemeanors. Now these prohibitory laws do not make the transgression a moral offense, or sin: the only obligation in conscience is to submit to the penalty, if levied. It must however be observed, that we are here speaking of laws that are simply and purely penal, where the thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compensation for the civil inconvenience supposed to arise from the offence. But where disobedience to the law involves in it also any degree of public mischief or private injury, there it falls within our former distinction, and is also an offence against conscience.

CHAPTER II.

SOURCES OF LAW.

1. The common law and custom.—Law may be divided, according to its source, into two kinds: The *lex non scripta,* the unwritten, or common law; and the *lex scripta,* the written, or statute law.

When I call these parts of our law *leges non scriptæ,* I would not be understood as if all those laws were at present merely oral, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic Druids committed all their laws as well as learning to memory; and it is said of the primitive Saxons here, as well as their brethren on the continent, that *leges sola memori et usu retinebant.* (They retained their laws solely by memory and custom.) But with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law *leges non scriptæ,* because their original institution and authority are not set down in writing as acts of parliament are, but they receive their binding power and the force of laws by long and immemorial usage, and by their universal reception throughout the kingdom. Custom is said to be the great original source of this collection of maxims, principles, and decisions which is now known by the name of the common law; a name either given to it in contradistinction to other laws, as the statute law, the civil law, the law merchant, and the like, or, more probably, as a law common to all the realm, the *jus commune,* or *folcright,* established by King

Edward the Elder, after the abolition of the several provincial customs of particular districts.

2. Content of the common law.—This is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligations of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences; with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the Chancery, the King's Bench, the Common Pleas, and the Exchequer;—that the eldest son alone is heir to his ancestor;—that property may be acquired and transferred by writing;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favorably, and deeds more strictly;—that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offence, and punishable by fine and imprisonment;—all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

Some have divided the common law into two principal grounds or foundations: (1) Established customs; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest: and (2) established rules and maxims; as "that the king can do no wrong," "that no man shall be bound to accuse himself," and the like. But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage; and the only method of proving, that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it. But though custom is the most likely foundation of this collection of maxims and decisions, yet the customs, so collected, are of higher antiquity than memory or history can reach, nothing being more difficult than to ascertain the precise beginning and the first spring of an ancient and long established custom.

3. How customs become law.—But here a very natural, and very material, question arises; how are these customs and maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes*" (the lucubrations of twenty years), which Fortescue mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of records, in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance.

4. Doctrine of Stare Decisis or abiding by precedents.—For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law; but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined.

5. Reason as the source and basis of law.—Hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. And it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

Cases of conflict between reason and precedent. The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king, or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath and the law. For herein there is nothing repugnant to natural justice; though the artificial reason of it, drawn from the feudal law, may not be quite obvious to everybody. And therefore, though a modern judge, on account of a supposed hardship upon the half brother, might wish it had been otherwise settled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seize any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was not law.

6. Decisions as evidence of the law.—So that the law and the opinion of a particular judge, are not always convertible

terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law. Upon the whole, however, we may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law:" in the same manner as, in the civil law, what the emperor had once determined was to serve as a guide for the future.

The reports of decisions. The decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of reports which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records, which always, in matters of consequence and nicety, the judges direct to be searched.

The reports are extant in a regular series from the reign of King Edward the Second, inclusive; and from his time, to that of Henry the Eighth, were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published annually, whence they are known under the denomination of the year books. And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day; for, though King James the First, at the instance of Lord Bacon, appointed two reporters with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by Lord Chief-Justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name.

7. Authoritative commentators.—Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staundforde, with some others of ancient date; whose treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the same learned judge we have just mentioned, Sir Edward Coke; who hath written four volumes of institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by Judge Littleton in the reign of Edward the Fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the ancient reports and year books, but greatly defective in method. The second volume is a comment upon many old acts of parliament, without any systematical order; the third a more methodical treatise of the pleas of the crown; and the fourth an account of the several species of courts.

Summary. And thus much for the first ground and chief corner stone of the laws of England, which is general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

8. Special or local customs.—The second source of the unwritten laws of England are particular customs, or laws, which affect only the inhabitants of particular districts. For reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament.

Such is the custom of *gavelkind* in Kent, and some other

parts of the kingdom (though perhaps it was also general till the Norman conquest), which ordains, among other things, that not the eldest son only of the father shall succeed to his inheritance, but all the sons alike: and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord. Such is the custom that prevails in divers ancient boroughs, and therefore called *borough-English,* that the youngest son shall inherit the estate, in preference to all his elder brothers. Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas, at the common law, she shall be endowed of one third part only. Such, lastly are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these are contrary to the general law of the land, and are good only by special usage; though the customs of London are also confirmed by act of parliament.

Special customs must be pleaded and proved. The rules relating to particular customs regard either the proof of their existence; their legality when proved; or their usual method of allowance.

Law merchant. To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants, or *lex mercatoria:* which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it, being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions.

9. English as a source of American Law.—Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately

there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force.

What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country. Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire), or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother-country, but distinct, though dependent, dominions. They are subject, however, to the control of the parliament; though (like Ireland, Man, and the rest), not bound by any acts of parliament unless particularly named.

These are the several parts of the dominions of the crown of Great Britain, in which the municipal laws of England are not of force or authority, merely as the municipal laws of England. Most of them have probably copied the spirit of their own law from this original; but then it receives its obligation, and authoritative force, from being the law of the country.

10. The Roman or civil law as the source of European law. —By the civil law, absolutely taken, is generally understood

the civil or municipal law of the Roman empire, as comprised in the institutes, the code, and the digest of the emperor Justinian, and the novel constitutions of himself and some of his successors.

These form the body of Roman law, or *corpus juris civilis* (the body of civil law), as published about the time of Justinian; which, however, fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi, Italy; which accident, concurring with the policy of the Roman ecclesiastics, suddenly gave new vogue and authority to the civil law, introduced it into several nations, and occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, is now loaded.

11. **Order of treatment.**—[Having considered the nature and sources of law in general, we shall now depart from Blackstone's arrangement, taking up (1) the law of torts or wrongs, (2) the law of crimes, (3) the law of contracts and obligations, (4) the law of personal property, (5) the law of real property, (6) the law of private relations, (7) the law of procedure, and (8) constitutional law.]

PART II

LAW OF TORTS

CHAPTER III.

PERSONAL RIGHTS AND PERSONAL INJURIES.

1. Scope of the law of torts.—At the opening of these Commentaries municipal law was in general defined to be, "a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." From hence, therefore, it followed, that the primary objects of the law are the establishment of rights, and the prohibition of wrongs. I proceed, therefore, now to enumerate the several kinds, and to inquire into the respective natures of all private wrongs, or civil injuries which may be offered to the rights of either a man's person or his property; recounting at the same time the respective remedies which are furnished by the law for every infraction of right. [The law of torts was developed in connection with certain "forms of action" or theories of liability, particularly "trespass" and "trespass on the case." We shall first examine the distinction between trespass and case; then pass to the various classes of general rights and the kinds of torts or injuries which violate them; and lastly, consider the conditions of responsibility, intent, negligence and acting at peril, which make a man chargeable as the cause of harm.]

2. Trespass and Case.—All civil injuries at common law were divided into two kinds, the one without force or violence, as slander, libel, deceit, or the detention of goods; the other coupled with force and violence as battery or false imprisonment. [This distinction of private wrongs into injuries with and without force arises historically from the forms of action or remedy which became available.]

3. Choice between forms of action.—[The distinction between trespass and case is without logical basis, and a plaintiff is no

longer required to choose between them. Many old precedents in tort, however, such as the famous Squib Case, Scott v. Shepherd, 2 Wm. Blk., Rep. 892, are decided not on the merits, but on the applicability of the form of action chosen—the defendant being certainly liable in one or the other. III Street, Foundations of Legal Liability, p. 257.]

4. Classes of rights and injuries.—The rights which are recognized and protected by the law of torts may be distinguished as (1) such as concern the interests of men in their own persons; their personal security, liberty and reputation; (2) such as a man may acquire over external objects, things unconnected with his person, or rights of property; (3) rights arising from personal relations, which are incident to men as members of a family, connected to each other by various ties and relationships; [and (4) such as a man has in his general activities, his peace, freedom of choice and business or livelihood.] As we have thus divided rights, so we must make the same general distribution of wrongs or injuries which infringe them, into such as affect personal rights, property rights, family rights, and general activities. [Injuries to personal security may be committed by intentional assault and battery, or by negligent collision or contact, or even by nervous shock, as where one is prostrated by a narrow escape from sudden death, or through fright caused by a practical joke without any physical contact.]

5. Assault.—Assault is an attempt or offer to beat or do violence to another, without touching him; as if one lifts up his cane, or his fist in a threatening manner at another; or strikes at him, but misses him; this is an assault, which Finch describes to be "an unlawful setting upon one's person." This is incipient violence, amounting to more than bare threats or insulting and menacing words; and, therefore, though no actual harm, contact or suffering be proved, yet the party injured may have redress by action of trespass *vi et armis;* wherein he shall recover at least nominal damages as a compensation for the injury. [This is some protection to personal dignity against such insults as a man's shaking his fist in your face.]

6. Battery.—Battery is the unjustifiable beating of another. The least touching of another's person willfully, or in anger, is a battery, equally with wounding or mayhem; for the law can-

not draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.

Justification for battery. Battery is, in some cases, justifiable or lawful; as where one who has authority, a parent, or master, gives moderate correction to his child, his scholar, or his apprentice. So also on the principle of self-defence: for if one strikes me first, or even only assaults me, I may strike in my own defence; and, if sued for it, may plead *son assault demesne,* or that it was the plaintiff's own original assault that occasioned it. So likewise in defence of my goods or possession, if a man endeavors to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away. And, if sued for this or the like battery, I may set forth the whole case, and plead that I laid hands upon him gently, *molliter manus imposuit,* for this purpose. On account of these causes of justification, battery is defined to be the unlawful beating of another; for which the remedy is, as for assault, by action of trespass *vi et armis:* wherein the jury will give adequate damages.

7. Personal liberty and false imprisonment.—We are next to consider the violation of the right of personal liberty, as effected by the injury of false imprisonment, for which the law has not only decreed a punishment, as a heinous crime, but has also given a private reparation to the party; as well by removing the actual confinement for the present, as, after it is over, by subjecting the wrongdoer to a civil action, on account of the damage sustained by the loss of time and liberty.

To constitute the injury of false imprisonment there are two points requisite: (1) The detention of the person; and (2) The unlawfulness of such detention. Every complete deprivation of the liberty of movement, or limitation within certain boundaries is an imprisonment, whether it be confinement in a common prison, or in a private house, or in the stocks, or even by arresting and forcibly detaining one in the public streets, or preventing his leaving the room or place where he is.

[Partial interferences with personal liberty of movement in certain directions or with freedom of choice or action, such as

deceit, malicious prosecution, or malicious interference with business, must be included under another class of injuries. They may be regarded, however, as affecting specialized aspects of the broad right of personal liberty.]

Justification. Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority; which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment; or from some other special cause warranted, for the necessity of the thing, either by common law, or statute; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service, or the apprehending of waggoners for misbehavior in the public highways.

Remedy. This is the injury. Let us next see the remedy: which is of two sorts, the one removing the injury and restoring liberty is by writ of *habeas corpus;* the other making satisfaction for it, is by an action of trespass *vi et armis,* usually called an action of false imprisonment: which is generally, and almost unavoidably, accompanied with a charge of assault and battery also: and therein the party shall recover damages for the injury he has received.

8. **Defamation by slander and libel.**—[Reputation is the right to one's good name and the favorable opinion in which other people hold him. Injuries affecting a man's reputation are sharply divided by the common law into slander and libel, the first by spoken falsehoods reflecting on his character, skill, and business, or social standing; the second by printed or written words, pictures, signs, and all recorded forms of expression tending to hold him up to hatred, ridicule, or contempt. Although properly governed by the same principles, the law of slander is comparatively stunted and artificial, owing to the hostile attitude of common law courts in its formative stage, while the law of libel is more modern, normal and conformed to rational principle.]

9. **Slander.**—[The law of slander proceeds not on the theory that a good name is in itself rather to be chosen than great riches, but regards reputation and character only as a means to material and pecuniary advantage. Temporal or

pecuniary damage, not the loss of honor or good name *per se,* is made the gist of the right of action and liability for slander.]

Slander per se. In three enumerated classes of cases the law presumes damage, (1) as if a man accuses another of some heinous crime, as to say that a man hath poisoned another, or is perjured; (2) or charges him with having any loathsome infectious disease; (3) or makes slanderous imputations of incompetence which may impair or hurt him in his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave. It is said that formerly no actions were brought for words, unless the slander was such as (if true) would endanger the life of the object of it. But too great encouragement being given by this lenity to false and malicious slanderers, it is now held that, for defamatory words of the several species before mentioned, that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, or may impair his trade, an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen.

Slander actionable if causing special damage. But with regard to words that do not fall within these three enumerated classes it is necessary that the plaintiff should aver some particular damage to have happened; which is called laying his action with a *per quod.* As if I say that such a clergyman is a bastard, he cannot for this bring an action against me, unless he can show some special loss by it; in which case he may bring his action against me, for saying he was a bastard, *per quod* he lost the presentation to such a living.

[The common law of slander provided no redress by public apology or retraction, and no method by which a man could vindicate the honor of his name if called a liar, impostor, hypocrite, or if subjected to other abuse or disparagement, however gross and malicious if spoken privately to him alone; nor by which a woman could remove the reproach and shame of imputations of unchastity, or other calumnies tending to her disrepute, discredit, or disgrace, unless the plaintiff could found her action on direct and proximate pecuniary loss. This hostile stand of the courts was probably induced by fear of being overrun with frivolous actions brought to revenge personal insult, in a time when vituperation was more common. The courts so far insisted

on immediate pecuniary loss, apart from humiliation, contempt, and disgrace, as to hold nervous and mental shock with consequent illness and impairment of health (and also the damage resulting from repetition and propagation of the slander by others) as too remote to be considered. In America, either by statute or common law, imputations of unchastity are actionable by women without proof of special damage, and the attitude of the courts in regard to the elements of recoverable damage is much more liberal. 1 Street, Foundations Legal Liability, p. 284, Chapter XIX.]

10. **Libel.**—[The law of libel, on the other hand, does not make pecuniary loss, but the impairment of reputation, the basis of liability. It does not proceed by the illogical enumeration of arbitrary classes of cases, but by general principles. Any publication which tends to expose a man to hatred, ridicule, or contempt, or set him in an odious or ridiculous light and thereby diminish his reputation, is prima facie defamatory and libelous, whether the plaintiff can prove special damage or not. Every oral slander should be equally a prima facie legal injury, if tending to reflect on one's character or cause others to shun his society and think meanly of him.]

11. **Publication.**—[Communication to some third party is necessary to affect reputation. Therefore mere abuse, insult, or opprobrious words, if spoken privately and productive of no ill consequences to reputation, but only affecting one's feelings, honor, dignity, or peace of mind, will not support an action. Whatever remedy there may be for being called fool, coward, dog, or rascal in private or by letter, is extra-judicial and extra-legal; yet a large audience is not necessary, and if even one person be allowed to see or hear the words, although in a private and confidential manner, it becomes an injury, as if the words be dictated to a stenographer, or sent openly by postal card or telegram. Publication is presumed if the libel is put in the way of being read and understood.]

12. **Justification by truth.**—Every libel has a tendency to the breach of the peace, by provoking the person libeled to break it, which offence is the same (in point of law) whether the matter contained be true or false; and therefore the defendant, on a criminal prosecution for publishing a libel, is not at common law allowed to allege the truth of it by way of justifica-

tion. Truth is, however, sometimes allowed as a defence by statute, particularly if made for the public benefit, in honest belief and without malice.

But in a civil action for damages for the injury done the plaintiff the defendant may for libel, as also for slander, justify the truth of the aspersion and show that the plaintiff has received no injury at all, even though special damage has ensued; for it is then *damnum absque injuria* (damage without injury); and where there is no injury the law gives no remedy. [This is a dangerous defence, for the burden is on the defamer to prove the substantial truth of his disparaging remarks, and neither honest belief nor the repetition of rumor or hearsay on the authority of another is an excuse.] But if the defendant be able to justify and prove the words to be true, whether in or out of season, whether spoken from good or bad motives, no action will lie even though special damage has ensued; for then it is no slander or false tale, as if I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions.

13. **Privileged occasions.**—[Wherever there is sufficient occasion, the law allows exceptions to the strict rule that he who attacks the good name of another does so at his peril and at his own risk of being able to show his words to be true. This relaxation or privilege excusing untrue statements may be an absolute exemption, allowing free speech to prevail over the right of reputation without inquiring into motives; or it may be qualified and conditional, depending on honesty of belief and the necessity of the communication.]

Absolute privilege. [To insure freedom of speech, the law grants absolute immunity to reflecting words used in legislative and in judicial proceedings, whether by judge, jurors, parties, counsel, or witnesses, if pertinent to the cause in hand; and on like grounds of public policy the fair report of such proceedings is conditionally privileged, whether the statements prove true or false.]

Conditional privilege. [On grounds of social expediency, adverse comments, spoken in a friendly manner by way of advice or admonition to a friend in his interest, or in the interest of the speaker, are privileged even though groundless and mistaken, provided they are bona fide and not maliciously spoken; that

is, for a proper purpose without any tincture of spite or ill will and in honest belief in their truth. The occasion must not be exceeded or abused as by needlessly sending the advice by post card or telegram, instead of by letter.]

Fair comment and reports. [Fair comment or criticism on matters of public interest or general concern, such as books, theatres, public men, their character and their public acts, is conditionally privileged, for it is proper and expedient that their merits or demerits should be discussed and exposed, but malice or indirect motives will destroy the privilege; and adverse comments casting aspersion on moral character of public men are strictly limited, especially when they assert untrue facts of conduct as contrasted with comments in the nature of a judgment or opinion upon them. The repetition of untrue aspersions on the authority of another person is not privileged; it is not lawful to repeat slander; a fair report of public judicial or legislative proceedings is excused, however, irrespective of the truth of reflecting statements made in the proceedings.]

CHAPTER IV.

DOMESTIC RELATIONS AND INJURIES THERETO.

1. Injuries affecting the marital relation.—We are next to contemplate those wrongs which interfere with relative rights or such as are incident to persons considered as members of a family, and connected to each other by various ties and relations; and, in particular, such injuries as may be done to persons under the four following relations, husband and wife, parent and child, guardian and ward, master and servant.

Injuries that may be offered to a person, considered as a husband, are principally three: (1) abduction, or taking away a man's wife from his custody; (2) adultery, or criminal conversation with her; and (3) beating or otherwise abusing her and depriving the husband of consortium with her. As to the first sort, abduction, or taking her away, this may either be by fraud and persuasion, or open violence: though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by writ of ravishment, or action of *trespass vi et armis, de uxore rapta et abducta* (for the ravishment and abduction of his wife). This action lay at common law, and thereby the husband shall recover, not the possession of his wife, but damages for taking her away. The husband is also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause.

Adultery, or criminal conversation with a man's wife, though it was, as a public crime, left by the common law to the coercion of the spiritual courts; yet considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass vi et armis against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased and diminished by circumstances; as the rank and fortune of the plaintiff and the defendant; the relation or connection between them; the

seduction or otherwise of the wife, founded on her previous behaviour and character, and the husband's obligation by settlement or otherwise to provide for those children which he cannot but suspect to be spurious.

The third injury is that of beating a man's wife, or otherwise ill-using her; for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass vi et armis, which must be brought in the name of the husband and wife jointly; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived temporarily of the company and assistance of his wife or consortium, the law then gives him a separate remedy by an action of trespass in nature of an action upon the case for this ill-usage, *per quod consortium amisit* (by which means he lost the society of his wife); in which he shall recover a satisfaction in damages.

2. **Injuries to parental rights.**—Injuries that may be offered to a person considered in the relation of a parent or guardian are likewise of two kinds: (1) Against his rightful custody by abduction, or taking his children away, for which the father may sue in trespass in the same manner as the husband on account of the abduction of his wife, and (2) against his right to their services. The point of injury in beating, confining, debauching, seducing, or disabling a man's child, depends upon the same principle as if the relation were master and servant; viz., the property which the master has in the labor of the servant. In this case, besides the remedy of an action of battery or imprisonment, which the servant or infant himself as an individual may have against the aggressor, the parent or master also, as a recompense for his immediate loss, may maintain an action of trespass vi et armis; in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit* (by which means he lost his service); and then the jury will make him a proportionable pecuniary satisfaction. A similar practice to which, we find also to have obtained among the Athenians, where masters were entitled to an action against such as beat or ill-treated their servants.

Seduction of daughter. [The courts have not directly recognized any right of the parent in the honor, virtue, and chastity of the daughter, but have timidly extended the established

remedy for the loss of services of a hired servant, rather than recognize a new right or liability for seduction. The relation of service is made the gist of the action, although the measure of damages is discretionary, allowing room for parental disgrace and sorrow as well as loss of actual service. It has been said that the English law affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread among strangers. American jurisdictions generally make it immaterial whether the daughter or ward be living at home or in the service of the one standing in loco parentis, either at the time of the seduction or of the confinement, and whether or not there be loss of service.]

The victim of seduction. [The female who is seduced and got with child has no cause of action at the common law for the wrong done her, her consent being a defence to trespass, and even the seducer's fraud not being recognized as a ground of liability in deceit, probably from the fact of her own share in the fault. Statutes have, however, extended a remedy in the nature of deceit in many American jurisdictions, and provide redress for the victim herself.]

3. Rights of wife, child, or servant.—We may observe that in these relative injuries, notice is only taken by the common law of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by similar injuries is totally unregarded. One reason for which may be this: that the inferior has no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for corporal harm to or the beating of her husband, for she has at common law no separate interest in anything during her coverture. The child has no property in his father or guardian, as they have in him, for the sake of giving him support, education, and nurture. Yet the wife or the child, if the husband or parent be slain, had anciently a peculiar species of criminal prosecution allowed them, in the nature of a civil satisfaction; which was called an appeal. [Some courts have come to recognize the wife's interest in the marital relation, and the society, sup-

port and affection of her husband, as a right, and allow her an action for the alienation of her husband's affection. Wolf v. Frank, 92 Md. 138, 48 Atl. 132.]

4. **Wrongful death.**—[By statute a right of action is given in all jurisdictions to the widow and children, or to the administrator on their behalf, to recover damages for the wrongful death of a husband and father. The substantive right thereby recognized is the interest which the wife has in the support, society, and protection of her husband, and the expectation which the children have of support, nurture, and education from their parent. The interest of father or mother in the life of the child is likewise recognized, where the deceased would himself have had a right of action. The basis of damage is generally the probable pecuniary value of the life to the relations, which includes comfort, companionship, protection, and support, but not solace for mental anguish, grief, and bereavement. The amount recovered is not part of the estate of the deceased, nor liable to his debts, but belongs to the relatives according to the loss suffered by each.]

CHAPTER V.

PERSONAL PROPERTY AND INJURIES THERETO.

1. Classification of topics.—In the preceding chapters we have considered the wrongs or injuries that affect personal rights and relations; and are at present to enter upon the discussion of such injuries as affect the rights of property, together with the remedies which the law has given to repair or redress them.

And here we must follow the division of property into personal and real; personal, which consists in goods, money, and all other movable chattels; a property which may attend a man's person wherever he goes, and from thence receives its denomination; and real property, which consists of such things as are permanent, fixed, and immovable—as lands, tenements, and hereditaments of all kinds, which are not annexed to the person, nor movable from the place in which they subsist.

Rights of personal property are liable to two species of injuries: the amotion or deprivation of their possession; and the abuse or damage of the chattels, while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches: the unjust and unlawful taking them away; and the unjust detaining them, though the original taking might be lawful.

2. Forms of action for wrongs to personal property.—[What amounts to a wrong to personal property, and the various species of injuries, ought not to be a subject of great difficulty or complexity. Yet in fact the common law of torts is much complicated, owing to its expression in terms of the old forms of action. The classification and definition of the different species of torts, even at the present day, are based on the historic distinctions between the different forms of action and remedy. The test of the existence of liability and of the amount of damages may depend upon whether one form or another is applicable. Therefore, in order to understand the distinctions and intricacies of the law, it is necessary to consider the scope of the various

actions or theories of liability recognized by the common law courts in dealing with the wrongs to personal property.]

3. Trespass to goods.—[The wrong of trespass to goods includes those species of liability falling within the general theory of the action of trespass, *i. e.*, direct physical interference with possession. Such are: (1) asportation, where the article is forcefully taken from the actual or virtual possession of another; (2) the abuse or damage of the chattels by physical contact while in the possession of another, *e. g.*, by killing, beating, or defacing them. Such taking or damage, however, while the article is out of the owner's possession, is no trespass as to him, because there is no disturbance or violation of his possession, and liability falls within the sphere of case or other form of action. The technical limits of trespass to the party in possession of real or personal property are probably due to its historical origin as a semi-criminal action.]

4. Replevin.—In the case of the wrongful taking of goods the natural remedy would be the restitution of the goods themselves so wrongfully taken, with damages for the loss sustained by such unjust invasion; which is effected by action of *replevin*. This obtains at common law only in one instance of an unlawful taking, that of a wrongful distress, and this and the action of *detinue* (of which I shall presently say more) are almost the only actions in which the actual specific possession of the identical personal chattel is restored to the proper owner. For things personal are looked upon by the law as of a nature so transitory and perishable, that it is for the most part impossible either to ascertain their identity, or to restore them in the same condition as when they came to the hands of the wrongful possessor. And since it is a maxim that "*lex neminem cogit ad vana, seu impossibilia*" (the law compels no one to do things which are either useless or impossible), it therefore contents itself in general with restoring, not the thing itself, but a pecuniary equivalent to the party injured; by giving him satisfaction in damages.

Deprivation of possession may also be by an unjust detainer of another's goods, though the original taking was lawful. As if I distrain another's cattle damage-feasant, and before they are impounded he tenders me sufficient amends; now, though the original taking was lawful, my subsequent detainment of

them after tender of amends is wrongful, and he shall have an action of replevin against me to recover them: in which he shall recover damages only for the detention and not for the caption, because the original taking was lawful.

5. Detinue.—If I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking, and the regular method for me to recover possession is by action of *detinue*. In this action of detinue it is necessary to ascertain the thing detained, in such manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like; for that cannot be known from other money or corn; unless it be in a bag or sack, for then it may be distinguishably marked.

In order, therefore, to ground an action of detinue, which is only for the detaining, these points are necessary: (1) That the defendant came lawfully into the possession of the goods, as either by delivery to him, or finding them; (2) That the plaintiff have a property; (3) That the goods themselves be of some value; and, (4) That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional: that the plaintiff recover the said goods, or (if they cannot be had) their respective values, and also the damages for detaining them. But there is one disadvantage which attends this action, viz.: that the defendant is herein permitted to "wage his law," that is, to exculpate himself by oath and thereby defeat the plaintiff of his remedy, which privilege is grounded on the confidence originally reposed in the bailee by the bailor, in the borrower by the lender, and the like, from whence arose a strong presumptive evidence that in the plaintiff's own opinion the defendant was worthy of credit. But for this reason the action itself is of late much disused, and has given place to the action of trover.

6. Trover.—This action of trover and conversion was in its original an action of trespass upon the case, for recovery of damages against such person as had found another's goods, and refused to deliver them on demand, but converted them to his own use; from which finding and converting it is called an action of trover and conversion. The freedom of this action from wager of law, and the less degree of certainty requisite in

describing the goods, gave it so considerable an advantage over the action of detinue, that by a fiction of law actions of trover were at length permitted to be brought against any man who had in his possession, by any means whatsoever, the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion: for any man may take the goods of another into possession, if he finds them; but no finder is allowed to assert a property therein, unless the owner be forever unknown: and therefore he must not convert them to his own use, which the law presumes him to do, if he refuses to restore them to the owner; for which reason such refusal alone is, prima facie, sufficient evidence of conversion. The fact of the finding, or trover, is, therefore, now totally immaterial: for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them, and if he proves that the goods are his property, and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved, and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself, which nothing will recover but an action of detinue or replevin.

7. Conversion.—[The wrong of conversion includes those interferences with the rights of property which fall within the theory of the action of trover. It is beyond our scope to enter into the fine and somewhat metaphysical distinctions as to what is a conversion and what is not. It is somewhat analogous to disseisin of land. Conversion has come to include: (1) Wrongful taking of goods out of another's possession; (2) The wrongful detaining of another's goods, though the original possession was lawful; (3) The wrongful destruction or disposing of goods, whether by consuming, destroying, selling, or delivering them to one not entitled.

Conversion thus includes all forms of deprivation of the possession and control of the object by an act of willful interference. Conversion in the first case, by taking, amounts also to a trespass, which if done *animo furandi* (with the intention of stealing) amounts to the crime of larceny or theft. Conversion may or may not include a trespass. Salmond, Torts (2nd ed.), 296-303.]

CHAPTER VI.

REAL PROPERTY AND INJURIES THERETO.

1. Classification of real injuries.—We come now to consider such injuries as affect that species of property which the common law has denominated real, as being of a more substantial and permanent nature than those transitory rights of which personal chattels are the object. Injuries affecting real property are principally four: (1) Ouster or total dispossession; (2) Trespass or disturbance of possession; (3) Destruction and damage to the land itself (trespass and waste); (4) Nuisance or interference with use, value, or enjoyment of the land.

2. Ouster.—Ouster or total dispossession is a wrong or injury by which the wrongdoer intrudes into the actual occupation or control of the land and obliges the owner to seek his legal remedy in order to regain possession and re-establish himself in the position of owner. Distinctions may be observed between (1) disseisin; (2) deforcement; and (3) ejection.

Disseisin. Disseisin is the ancient name of that species of ouster which results from the wrongful putting out of him that is seized of a freehold estate. Seisin may be described as the occupation of land by one who claims such a substantial interest therein that it is dignified by the name "freehold," namely, an estate of inheritance or for life, as contrasted with a term or lease for years.

Disseisin, then, is the wrongful entry upon the land and the dispossession of the freeholder; as if a man enters into a house owned by another in fee simple and turns him or his tenants out of possession.

The term ouster includes not only disseisin, but also the withholding of possession where the entry was at first lawful, but the right of possession has ceased. It has, however, become immaterial to distinguish between the different forms of ouster, as ejectment is now the remedy for all.

Ejection. [Dispossession from a leasehold or estate for years, although by nature a species of disseisin, is carefully distinguished at common law by the term ejection; which is the turning out of the tenant from the occupation of the land during the continuance of his lease. The lessee or termor was treated at first as one who had no interest in the land, but merely the benefit of a contract with the landlord. At the first he had no remedy to recover possession of his term. When his interest in the land was recognized it was termed a "chattel real" and he was said to be "possessed," not to be "seised" like the freeholder. When there is a lessee occupying the land he is possessed, but the landlord, as freeholder, is seised. The possession of the tenant was protected by the action of ejectment, the real actions protecting seisin, such as the assize of novel disseisin, never having been extended to him.]

3. Remedies for ouster.—[The principal species of injury by ouster, or dispossession, being thus ascertained and defined, the next consideration is the remedy, which is universally the restitution or delivery of possession to the rightful owner by action of ejectment, which remedy is founded on right to possession. The action of ejectment superseded the older real actions which protected seisin and became the universal means by which freeholders as well as leaseholders could recover possession of land. After recovery of the land a separate action of trespass could be brought for mesne profits and the loss by being kept out of possession. This claim may now usually be joined in the same action with ejectment.]

[An action for damages for the unjust deprivation of land is no adequate remedy; and the tort leaves the right of the owner untouched, the thing still belonging to him. If, therefore, an action for the tort were the owner's only remedy, he must be permitted to bring successive actions *ad infinitum*, or as long as the thing continued to exist; for in that way alone could he obtain full compensation for the injury he would eventually suffer. In the case of movable things, on the other hand, conversion had, at common law, the effect of practically destroying the owner's property, but in the modern law this is at the owner's election, for he can either recover possession of the thing itself, in detinue or replevin, or make the tort-feasor a purchaser of the thing at such price as the jury shall assess as

the market value, in trover. Langdell, Survey of Equity Jurisdiction.]

4. Trespass and its varieties.—Under the preceding head we have considered such injuries to real property, as consist in an ouster or dispossession. The second species of injuries that affect a man's right to lands is that of disturbance of possession, which may arise from the unpermitted entry or presence of a stranger on the premises, or mere contact with them, without any removal of the possessor from control.

Trespass, in its largest and biblical sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live; whether it relates to a man's person, or his property. In the law it includes those wrongs for which the remedy was action of trespass. Therefore beating another is a trespass; for which (as we have formerly seen) an action of trespass vi et armis in assault and battery will lie; taking a man's goods or land from his possession are, respectively, trespasses; for which an action of trespass vi et armis is given by the law.

But in the limited and confined sense in which we are at present to consider it, it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property.

5. Trespass by entry.—Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close: the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit.* For every man's land is, in the eye of the law, enclosed and set apart from his neighbor's, and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal, invisible boundary existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz.: the treading down and bruising his herbage.

The Roman laws seem to have made a direct prohibition necessary, in order to constitute this injury: But the law of England, justly considering that much inconvenience may happen

to the owner, before he has an opportunity to forbid the entry, has carried the point much farther, and has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases), as an injury or wrong, for satisfaction of which an action of trespass will lie; but determines the *quantum* (quantity) of that satisfaction, by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage sustained.

6. **Trespass by remaining on land.**—[One present by invitation or permission may become guilty of trespass by remaining on land after his leave or license to enter has ceased. An ordinary invitation, permission, or license by the possessor may be revoked at any time, and then the licensee remaining may be regarded as a trespasser. He may be forcibly ejected as such, if he refuses to leave when requested, after a reasonable opportunity of leaving peaceably has been given him. But a tenant holding over is no trespasser against his landlord, as trespass is a disturbance of the person in present possession of the land.]

7. **Trespass ab initio—Abuse of authority.**—But in cases where a man enters under license given by the law (as contrasted with permission given by the owner), and makes an ill use of the authority with which the law intrusts him, he shall be accounted a trespasser *ab initio* (from the beginning): as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to the inclinations of the owner; this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass. But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser; for this is only a breach of contract, for which the taverner shall have an action of debt or assumpsit against him. But, still, if a reversioner, who enters on pretence of seeing waste, breaks the house, or stays there all night; or if the commoner who comes to tend his cattle, cuts down a tree; in these and similar cases, the law judges that he entered for this unlawful purpose, and therefore, as the act which demonstrates such his purpose is a trespass, he shall be esteemed a trespasser ab initio.

8. **Trespass by relation.**—[Only the person in actual possession is entitled to maintain trespass for the disturbance of his exclusive occupation and use of the land. If the land be in pos-

session of a tenant, he is the one to sue in trespass, and not the owner out of possession. If the land be in the wrongful possession of a tenant or any other, the owner must first recover possession in ejectment or by re-entry. The plaintiff's possession is then said to relate back to the time when he acquired the right of possession, and he can recover for trespasses and "mesne profits" (damages for dispossession) from that date in an action of trespass.]

9. Trespass by contact.—[Any direct intrusion upon or beneath the surface is a trespass, as where coal and minerals are extracted, or tunnels are extended into a neighbor's mine; or where one causes any direct physical contact with land, buildings, trees, or things attached to the soil, as by throwing stones, turning cattle thereon, driving nails or posting bills upon a wall. Indirect damage such as the escape of water, or allowing stones to fall from a chimney or fruit to fall from a tree, comes within the theory of nuisance or case.]

10. Trespass in the air.—[Is an aeronaut liable to an action of trespass *q. c. f.*, at the suit of the occupier of every field over which his balloon or airship passes in the course of a voyage? There is no direct authority for such extension of liability in trespass, and on principle it does not seem consistent with the freedom of the public to use the ocean of air above the earth's surface. Such acts as flying a kite, sending a message by carrier pigeon, firing a rifle, or sailing an airship should not be deemed an injury to the one below, unless some harm, danger, or inconvenience be threatened to him in the occupation of his land. There is no reason why the owner of the soil should be allowed a monopoly of the air space above, of which he can have no effective use or control, except as needful to the enjoyment of the surface.]

[Some American jurisdictions do not recognize the proprietor of land as absolute owner of waters percolating in the soil, nor do foreign countries always recognize him as owner of undiscovered mineral.]

11. Continuing trespass.—In trespass of a permanent nature, where the injury is continually renewed (as by spoiling or consuming the herbage with the defendant's cattle), the declaration may allege the injury to have been committed by continuation from one given day to another (which is called laying

the action with a *continuando:* by continuation), and the plaintiff shall not be compelled to bring separate actions for every day's separate offence. But where the trespass is done by several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando;* yet if there be repeated acts of trespass committed (as cutting down a certain number of trees), they may be laid to be done, not continually, but at divers days, and times within a given period.

12. Justification for trespass.—In some cases trespass is justifiable; or rather entry on another's land or house shall not in those cases be accounted trespass: as if a man comes thither to demand or pay money, there payable; to abate a nuisance; or to execute, in a legal manner, the process of the law. Also a man may justify entering into an inn or public house, without the leave of the owner first specially asked; because when a man professes the keeping such inn or public house, he thereby gives a general license to any person to enter his doors. So a landlord may justify entering to distrain for rent; a commoner to attend his cattle, commoning on another's land; a reversioner, to see if any waste be committed on the estate; or an owner to recapture his goods; a license to enter arising from the obvious necessity of the thing. Also it has been said that by the common law and custom of England, the poor were allowed to enter and glean upon another's ground after the harvest, without being guilty of trespass, which humane provision seems borrowed from the Mosaic law.

13. Trespass to try title.—A man may also justify in an action of trespass on account of the freehold (*liberum tenementum*) and right of entry being in himself; and this defence brings the title of the estate in question. This is, therefore, one of the ways devised, since the disuse of real actions, to try the property of estates; though it is not so usual as that by ejectment, because that, being now a mixed action, not only gives damages for the ejection, but also possession of the land; whereas in trespass, which is merely a personal suit, the right can only be ascertained, but no possession delivered; nothing being recovered but damages for the wrong committed, and these up to the date of commencing the action only.

CHAPTER VII.

NUISANCE AND WASTE.

1. Varieties of nuisance.—A third species of injuries to a man's land is by nuisance, disquieting the occupier or owner in his regular and lawful enjoyment.

Nuisance, *nocumentum,* or annoyance in its largest sense, signifies anything that works hurt, inconvenience, or damage. The term is vague, having failed to acquire any precise technical signification. Nuisances are of two diverse kinds: the one public or common nuisances such as obstructing the public highways or otherwise causing annoyance to the community at large; these are punishable as misdemeanors, although they may give rise to private actions if they cause special injury to individuals in their person or property. Private nuisances, which are the objects of our present consideration, include two different sorts of injury: (1) Anything done to the hurt, annoyance, or disturbance of the occupation of land of another; (2) The disturbance of easements and other incorporeal hereditaments. We will, therefore, first mark out the several kinds of private nuisances, and then their respective remedies.

2. Scope of nuisance.—[Injuries to land embraced under nuisance include those miscellaneous forms of wrongful damage not embraced under trespass, viz.: (1) consequential damage of a physical and tangible nature, such as the overhanging of branches, or the ingrowing of roots of a tree; the dropping of leaves; causing of water to overflow; the spread of fire; the fall of a dangerous wall or chimney; the straying of a dog, or chickens. Such damage is not the direct physical act of the defendant, but is caused indirectly and without violence, and therefore the action of trespass was not available. (2) The second variety of nuisance consists not in physical damage to the land, but in the disturbance of the health, comfort, and convenience of the occupier by intangible means, such as the escape of gas, noxious fumes from a smelting works, noises and vibra-

tions from an elevated street railroad, offensive odors from stables, hog-pens, tan yards or soap factories, the harboring of infectious diseases, the keeping of explosives, and the obstructing of the approaches to the property.]

3. **Further illustrations of nuisances.**—If a man builds a house so close to mine that his roof overhangs my roof, and throws the water off his roof upon mine, this is a nuisance rather than a trespass, not being his direct act. Also, if a person keeps his hogs, or other noisome animals, so near the house of another, that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. A like injury is, if one's neighbor sets up and exercises any offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, "*sic utere tuo ut alienum non laedas*" (so use your property that you do not injure that of another): this indeed is the great maxim of the law of nuisance. But depriving one of a mere matter of pleasure, as of a fine view by building a wall, or the like, this, as it abridges nothing essential to convenience or necessary to health and comfort, is not deemed an invasion of the rights of the sufferer, and is therefore not an actionable nuisance.

If one erects a smelting-house for lead so near the land of another that the vapor and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance. And by consequence it follows that if one does any other act, in itself lawful, which yet being done in that place necessarily tends materially to disturb the enjoyment of another's property, it is a nuisance, for it is incumbent on him to find some other place to do that act, where it will be less offensive.

4. **Interferences with incorporeal rights.**—It is a nuisance to stop or divert water that used to run to another's meadow or mill; or to corrupt or poison a watercourse, by erecting a dye-house or a limepit for the use of trade, in the upper part of the stream; or in short to make any unreasonable use of the water that in its consequences must necessarily tend to the prejudice of lower riparian proprietors. So closely does the law of England enforce that excellent rule of gospel morality, of "doing to others as we would they should do unto ourselves."

If I have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it or putting logs across it or ploughing over it, it is a nuisance, for in the first case I cannot enjoy my right at all, and in the latter I cannot enjoy it so commodiously as I ought.

5. Remedies for nuisances.—Let us next attend to the remedies which the law has given for these injuries of nuisance: Here I must premise that the law gives no private remedy for anything but a private wrong. Therefore no action lies for a public or common nuisance, but an indictment only: because, the damage being common to all the community, no one can assign his particular proportion of it; for if he could, it would be extremely hard, if every subject in the kingdom were allowed to harass the offender with separate actions. For this reason no person, natural or corporate, can have an action for a public nuisance. Yet this rule admits of one exception: where a private person suffers some extraordinary damage beyond the rest of the community by a public nuisance; in which case he shall have a private satisfaction by action. As if by means of a ditch dug across the public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for his particular damage, which is not common to others, the party shall have his action on the case for damage to person or property by nuisance, rather than for trespass.

6. Election of abatement or suit.—If a man has abated or removed a nuisance which offended him he is entitled to no action. For he had choice of two remedies: either without suit, by abating it himself, by his own mere act and authority; or by suit, in which he may both recover damages and remove it by the aid of the law; but, having made his election of one remedy, he is totally precluded from the other. This extrajudicial remedy by abatement or removal must be peaceable, without unnecessary damage, and in some cases upon notice.

7. Damages or injunction for nuisance.—The old real actions to abate a nuisance were long ago superseded by the action on the case for damages; in which the party injured shall only recover a satisfaction for the injuries sustained; but cannot thereby remove the nuisance. Indeed every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie, and very exemplary damages will probably be

given if, after one verdict against him, the defendant has the hardiness to continue it. If a man has a very obstinate as well as an ill-natured neighbor, who had rather continue to pay damages than remove his nuisance, he may apply to a court of equity for an injunction, equivalent to an order for abatement, which strikes at the root and removes the cause that occasions the wrong, instead of merely giving the plaintiff satisfaction for his injury past.

[Trespass is actionable per se, but an action on the case for nuisance lies only on proof of actual damage; and although one may abate overhanging branches or ingrowing roots, or drive away a straying cat or dog, he will have no action without proof of actual damage.]

8. **Waste.**—[We have now considered three species of injuries to land, dispossession, trespass, and nuisance. A fourth species of injury that may be offered to one's real property is by damage, or destruction by one tenant of another's estate, either in houses, woods, or lands; this is an interference by one with the rights of another proprietor, not by unseating him from his dominion or disturbing his possession, but where the one rightfully in possession for a limited interest demolishes the very substance of the thing, thereby impairing the value of the other's interest. The same acts may in the one case be waste and in the other trespass, according as the destruction is done by a tenant or by a stranger. A man rightfully in possession of land, such as a tenant for years or from month to month, is justified in committing certain destructive acts to property according to the extent of his interest and rights of use, which would be trespass in a stranger. What destructive acts amount to waste varies with the tenant and depends upon the division of interests between the temporary or partial estate of the possessor, and the permanent estate or inheritance of the remainder man or reversioner, which belongs to the law of property. Waste may be defined as the destruction of the substance of the land by the occupier or tenant to the prejudice of another who has the remainder or reversion or an interest in common in the land. It is the causing of unauthorized harm to future estates or other interests. Illustrations of waste by tenant for years are cutting timber, changing or removing buildings, taking minerals, gas or stone from new sources, and improper modes of tillage.]

9. Who may be injured by waste.—The persons who may be injured by waste, are such as have some future or co-existent interest in the estate wasted; for if a man be the absolute tenant in fee simple, without any incumbrance or charge on the premises, he may commit whatever waste his own indiscretion may prompt him to, without being impeachable or accountable for it to any one. And, though his heir is sure to be the sufferer, yet *nemo est haeres viventis* (no one is heir to the living); no man is certain of succeeding him, as well on account of the uncertainty which shall die first, as also because he has it in his power to constitute what heir he pleases, according to the civil law notion of an *haeres natus* (heir born, or natural heir) and an *haeres factus* (heir made or appointed): or, in the more accurate phraseology of our English law, he may alien or devise his estate to whomever he thinks proper, and by such alienation or devise may disinherit his heir at law. Into whose hands soever therefore the estate wasted comes, after a tenant in fee simple, though the waste is undoubtedly *damnum* (loss), it is *damnum absque injuria* (damage without injury).

10. Reversioners and remaindermen.—The most usual and important interest, that is hurt by this commission of waste, is that of him who has the remainder or reversion of the inheritance after a particular estate for life or years in being. Here, if the particular tenant commits or suffers any waste, it is a manifest injury to him that has the inheritance, as it tends to mangle and dismember it of its most desirable incidents and ornaments, among which timber and houses may justly be reckoned the principal. To him therefore in remainder or reversion, to whom the inheritance appertains in expectancy, the law has given an adequate remedy. But he who had the remainder for life only, was not formerly entitled to sue for waste; since his interest might perhaps never come into possession, and then he would have suffered no injury.

11. Remedies for waste.—A writ of waste was an action, partly founded upon the common law, and partly upon the statute of Gloucester; and could be brought by him who had the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by the curtesy, or tenant for years. This action was also maintainable in pursuance of statute Westm. 2, by one tenant in common of

the inheritance against another, who makes waste in the estate holden in common. This action of waste was a mixed action; partly real, so far as it recovered land; and partly personal, so far as it recovered damages. For it was brought for both those purposes; and, if the waste were proved, the plaintiff recovered the thing or place wasted, and also treble damages by the statute of Gloucester.

Action on the case. [An action on the case is now the remedy employed to recover damages done to a future interest by a party rightfully in possession who exceeds the use which he is entitled to make of the property.]

Injunction. Besides this redress by statute and at common law, the courts of equity, upon bill exhibited therein, complaining of waste and destruction, will grant an injunction in order to stay waste, until the defendant shall have put in his answer, and the court shall thereupon make further order. Which is now become the most usual way of preventing waste.

CHAPTER VIII.

MALICIOUS PROSECUTION AND DECEIT.

1. Nature of the rights involved.—[In the case of the injuries of deceit, malicious prosecution and malicious interference with business, it is said that damage is the gist or basis of legal liability; yet upon proper analysis we may perhaps discover what are the separate rights which are here to be protected, a class of rights which may be regarded as different aspects of the broad right of personal liberty. To analyze the right infringed by malicious prosecution, for example, we must find what is the interest which is invaded. Professor Wigmore suggests that it may be termed the right against vexation by litigation. (Wigmore, Cases on Torts, p. 864. Compare 1 Street, Foundations of Legal Liability, p. 279.) This is, however, a negative terminology. It may better be termed the right of civil peace.]

Malicious prosecution. [Blackstone and other writers have referred to malicious prosecution as a wrong injuring a man's reputation. Sir Frederick Pollock classes it with deceit as a wrong affecting a man in his estate, condition and convenience of life generally. Pollock, Torts, p. 6, 215, 393.]

[Undoubtedly the institution of criminal proceedings does damage to a man's estate and works havoc to his reputation. But the law of defamation is modern. Malicious prosecution had a remedy long before actions for slander and the right of reputation were heard of in common law courts. It is the institution of proceedings, the litigation, by which one wrongfully disturbs the repose and peace of his neighbor, which is the gist of the evil, not the publication of the criminal charge. Malicious prosecution is not to be regarded merely as an aggravated form of defamation, a way of destroying reputation.]

[The man who invokes the law and improperly sets in motion the machinery devised for the administration of justice, declares war upon the accused, whether it is a civil or criminal prosecution. The defendant cannot evade the struggle. He must defend

himself at his peril. He is subjected to the expense of litigation, the loss of time and effort in his ordinary affairs, the anxiety and discomfort of the contest in court and incurs the risk of imprisonment, infamy, financial ruin or serious loss. But the scandal, infamy, vexation, and expense are merely items of damage; the right on which the action is founded is an unnamed right which we may perhaps best call that of civil peace.]

2. Privilege for criminal prosecution.—Grave as is the offence of disturbing a man's peace and quiet and using the courts, under the mask of justice and public spirit, as engines of private spite and enmity; yet a very wide latitude is necessarily extended to litigation, both criminal and civil. In case of criminal prosecution of an innocent party any probable cause for preferring the charge is sufficient to justify the defendant, for it would be a very great discouragement to public justice if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments or informations miscarried. Good faith and probable cause are a complete justification, and the burden of proof is cast upon the plaintiff to show that the accusation was unreasonably false, and malicious.

3. Malicious civil proceeding.—[Liability for disturbing another's peace is not limited to malicious prosecutions for criminal offences; but for malicious civil actions, the right to retaliate by a counter-suit is limited to narrow bounds, and indeed is generally denied except for such as are per se defamatory, as bankruptcy or bastardy proceedings; this goes on the fictitious theory that costs recovered by a successful defendant are a sufficient indemnity to cover his damage.[1] In the case of certain very serious disturbances of a man's peace, as where an arrest is caused or the possession, use or enjoyment of property is taken away by malicious abuse of process or attachment, an action is more frequently allowed. In some states indeed an action lies for the malicious prosecution of any unfounded civil suit with baseless accusations of fraud or other disgraceful conduct. Eastin v. Stockton Bank, 66 Cal. 123.]

4. Deceit and the right of self-protective choice.—[One who willfully deceives another and thereby leads him to act to his own harm, is liable for any damage which his victim suffers by his misguided choice, in an action of deceit. What is the

[1] 1 Street, Foundations of Legal Liability, p. 331.

"gist" of this action? What is the primary interest of the plaintiff which is protected? The right involved is nameless in the law; it would seem to relate to one's ability to protect and promote his various interests by the intelligent choice and direction of his own activities. It is infringed when one is misled, coerced, or deceived into acting contrary to his desires or interests and is thereby made the instrument of his own destruction. It is commonly said that damage is the foundation of the defendant's liability. It would seem, however, that we have here a substantive right, one which may be described as the right of self-protective choice, which is violated by wrongfully leading another into a self-destructive choice of conduct, prejudicial to his own interests. It is only where the choice of conduct into which a man has been beguiled is self-destructive and results in actual detriment, such as pecuniary loss or physical harm, that a remedy is given. Here the right of self-protective choice—not the mere freedom of choice—is guaranteed.]

Damage to person or property. [Deceit is not a wrong against property, but rather, in a broad sense, against personal liberty. The damage may be either pecuniary or personal; one may be cheated by being induced to buy worthless shares of "wild-cat" mining stock on the faith of a fraudulent prospectus, or one may be misled into injuring himself, physically, as where one buys an inferior gun, recommended to be safe and of a standard make, but which is so defective that it explodes when fired, mutilating his hand. Langridge v. Levy, 2 M. & W. 519; 4 M. & W. 337.]

[A woman had no right of action for her own seduction at common law on the ground of the maxim *volenti non fit injuria* (injury is not done to one who consents); and even if her consent were obtained by fraud, she had no action for deceit. But by statute where the consent is procured by false pretences, promise to marry, undue influence, drugs or other artful means, a right of action is sometimes given in the nature of deceit. It might well have been recognized at common law that persuading a girl of tender years to surrender her chastity and virtue by fraud, and so to consent to her own harm, was an infringement of the right of self-protective choice, giving rise to an action of deceit.]

5. Misrepresentation of fact.—[A misrepresentation, to infringe this right, must be a misrepresentation of a past or exist-

ing fact, *e. g.*, that a horse is four years old. Mere opinion, belief, prediction, persuasion, or advice, *e. g.*, that it is a "good horse," do not take away a man's power to choose freely and safely. So if a man relies upon promises, that is his own look-out and a question of contract. But where the representation concerns facts by the light of which a choice is to be made, this makes the defendant responsible, for it takes away from the plaintiff the power of intelligent choice.]

6. **Fraudulent motive.**—[In deceit the particular damage that ensues from an intentional misstatement need not have been contemplated. No dishonest motive, no actual intent to cheat or injure by the false representation are elements of liability. Knowingly to deprive another of the power to choose for himself and to lead him to act in the dark, even for a benevolent purpose, is an intentional violation of his right of independent, self-protective choice. The deceiver must therefore bear the risk of damage, whatever the motive. It is sufficient that under the circumstances the false representation is so made that the plaintiff's conduct in acting upon it is to be expected by the defendant in making the representation.]

7. **Knowledge of falsity.**—[Where the defendant has an honest belief in the truth of his representation, the statement embodying that belief is no violation of his duty to respect this right of self-protective choice and cannot therefore render its maker liable in an action for deceit. Assertions made in reckless ignorance are, however, the same as if the statement were a known falsehood. Whether, in case there is no reasonable ground for the belief, the man who requests and persuades another to act upon the erroneous basis to his detriment, is liable to make good the loss, is a question which has given rise to discussion.]

8. **Deception and reliance.**—[To show an infringement of this right the plaintiff must prove that he was actually misled, that he relied upon the false representation and that he was thereby beguiled into a choice of conduct to his damage which he would otherwise have avoided. A misrepresentation, however, need not be the sole inducing cause if it was a material inducement to the course which resulted in damage. The plaintiff must prove actual damage.]

CHAPTER IX.

MALICIOUS INTERFERENCE WITH BUSINESS.

1. **The right of business.**—[Every man has a right to enjoy the fruits and advantages of his own enterprise, industry, and skill and to be free from malicious and wanton disturbance or annoyance in his occupation, profession or way of getting a livelihood. This right is one that has no accepted name in our law, although it was clearly pointed out by Chief Justice Holt more than two hundred years ago; and the reason or principle of it has not to this day come to full recognition.[1] Yet the questions as to the protection of this right, arising out of the rapid development of trade combinations, both of capital and labor, go to the very foundations of the law of personal liberty and civil wrongs.]

2. **Scope of this right.**—[This right is itself a branch of the more general right of personal liberty, of which the complete amotion constitutes false imprisonment. Every man has a right in his own personal freedom and business activities to the extent of having a fair chance of profit. He is therefore protected in carrying on his business, trade or employment freely, without unjustifiable interference; and as a consequence he is protected in the various results of such activities, such as established business relations, good will, reputation as gained by merit and advertising, the use of trademarks and trade names, and every other situation of real and substantial value which he has given up his time and capital to obtain. In Keeble v. Hickeringill, 11 East 574, decided by Lord Holt in 1705, the plaintiff was the owner of a decoy pond to which wild fowl used to resort; the plaintiff had prepared decoy ducks and nets for decoying and

[1] It was even denied by Lord Herschell in Allen v. Flood (1898) A. C. 1, that every man has a legal right to pursue his trade or calling without molestation or obstruction, and that any one who molests or obstructs him is guilty of a wrong, unless he can show lawful justification or excuse, but a different point of view appears in Quinn v. Leathem (1901) A. C. 495.

taking of the wild fowl; the defendant, without entering on the land, maliciously discharged guns near the decoy pond, thereby frightening away the wild fowl and depriving the plaintiff of his profit and benefit in taking them.

[Lord Holt pointed out that scandalous words spoken of a man to disparage him in his trade or profession are actionable per se, without proof of actual damage, merely because they are mischievous in tendency and frequently productive of harm. How much more, where the defendant does an actual and real damage to another when he is in the very act of receiving profit by his employment.]

3. **Fair competition justifiable.** — [Competition, however severe, even if it drives a rival from the field, if unattended by circumstances of dishonesty, intimidation, molestation, or other unfair means, is justifiable;] for by fair emulation the public are like to be the gainers. Thus if a schoolmaster starts up a new school to the damage of an ancient school and thereby the scholars are allured from the old school to come to his new one, to the ruin of the old, it is *damnum absque injuria;* but if the new schoolmaster should lie in the way with guns, and fright the boys from going to the old school, and their parents would not let them go thither, surely then the schoolmaster might have an action for the loss of his scholars and the legitimate profits of his school.

4. **Established business relations.**—[The oldest species of disturbance of business is that of malicious interference with contracts and other established business relations.] Such is disturbance of tenure, or breaking that connection which subsists between the landlord and his tenant, and to which the law pays so high a regard, that it will not suffer it to be wantonly dissolved by the acts of a third person. To have an estate well tenanted is an advantage that every landlord must be very sensible of, and therefore, the driving away of a tenant from off his estate is an injury of no small consequence. If there be a tenant of any lands or tenements, and a stranger, either by menaces and threats, or by fraud and circumvention, or other means, contrives to drive him away or inveigle him to leave his tenancy, this the law considers a wrong and injury to the landlord and gives him a reparation in damages against the offender by a special action on the case.

5. Procuring breach of contracts.—Retaining a man's hired servant during the time he has agreed to serve his present master is an injury. For every master has by his contract a right in the service for a limited time; therefore the inveigling or hiring a servant, which induces a loss of this service, is an injury to the master for which the law has for centuries given him a remedy. [Maliciously procuring a breach of all contracts of employment, if not contracts of every description, is a disturbance of this right. Interferences with the formation of free business relations have also come to be recognized as tortious, as where trade unions conspire to persecute, intimidate or coerce non-union workmen to the abandonment of their employment; or where by the unlawful means of boycott, picketing or violence they deprive employers of their chance to employ laborers and interfere unjustifiably with the free carrying on of their business.]

6. The struggle between capital and labor.—[Many hostilities of commercial warfare between employees and their employers may be justified under the name of fair competition. Such are strikes, or the quitting of employment in a body with intent to coerce an employer by injury to his business, the persuading of laborers to quit employment or to refuse work; others are questionable, as boycotts of an employer by the persuading of third persons not to patronize, buy from, sell to, serve or employ him.]

7. Test of liability.—[These methods of bringing pressure to bear on others are justifiable only when the rules of commercial warfare and fair competition are observed. In Allen v. Flood the learned Lords became entangled in a formula as to whether malice makes an act illegal which is legal in itself. But acts are never rightful or tortious per se, but only according to their effects on the rights of others. The general test of liability and justification would seem to be whether the interference to business is done fairly in striving for the legitimate interests of the parties in the struggles between men and different sets of men in adjusting by competition their economic relations. Such injury is justifiable if inflicted for the direct advancement or protection of one's interests against the person upon whom it operates, in the struggle to raise wages and to better industrial conditions. Indirect pressure must not be used, however, by

coercion inflicted on inoffensive persons, who are non-combatants and not parties to the dispute. To inflict punitive injuries on third parties, as by "sympathetic strikes," and boycotts, and so to promote one's interests indirectly, is not justifiable. Moreover, strikers must not employ defamation, fraud, violence, or menaces or threats of violence, intimidating customers from dealing or workmen from securing employment or continuing therein if they choose to do so. Likewise blacklists must not be circulated by employers by which workers are marked out for special avoidance, merely for personal spite, enmity, and revenge and not for legitimate protection.]

8. **Remedies.**—[The ordinary remedy for interference with the rights of business is by an injunction in equity. From the nature of the right, an action for damages is inadequate and seldom resorted to. The free application of injunctions to labor disputes in cases of strikes and boycotts, against the unlawful acts of striking employees which threaten irreparable mischief to property and business, has been stigmatized as "Government by Injunction" and made a political issue by organized labor.]

9. **Slander of title.**—[To slander another man's title, by spreading such injurious reports as, if true, would deprive him of his estate, is actionable provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land. Malachy v. Soper, 3 Bing. N. Cas. 371; 32 E. C. L. 161. This would seem to be an interference with the owner's right of making a profit by an advantageous disposition of his land.]

10. **Damaging falsehood.**—[False statements disparaging the quality of merchandise or property of another by which one loses the patronage of the public would seem to fall under the same principle. So falsehoods not defamatory in their nature as where one publishes a statement to the effect that the plaintiff has ceased to carry on his business of boiler-maker, by which a general loss of business occurs, are actionable. While damage is said to be of the gist of the action, the basis in this case also would seem to be the right of business. Ratcliffe v. Evans (1892), 2 Q. B. 524; Dooling v. Budget Pub. Co., 144 Mass. 258.]

CHAPTER X.

ACCOUNTABILITY AND DUTIES IN THE LAW OF TORT.

1. Nature of duties in tort.—[The law of torts is that department of the law which has to do with the redress and prevention of positive harm. It enforces the moral precept, "Thou shalt do no hurt to thy neighbor." It divides naturally into two great branches: the first concerns the various species of rights and injuries; the second concerns duties and the principles of liability, accountability, or responsibility for wrongs. "Wrong" presupposes some interest of person or property in respect of which harm is suffered. The nature and scope of the interests which are recognized and protected by the law of torts as legal rights have already been examined in connection with the various harms which may be offered to the security of the person, to personal relations, to property, and to personal liberty, peace and business activities.]

[We come now to the directory branch of the law of torts which prescribes duties, whereby all persons are instructed and enjoined to observe those rights. The principles which determine whether, under given circumstances, a person is to be held responsible for the infliction of harm, define his legal duties in the law of torts, or in other words how far he must moderate and accommodate the exercise of his own pursuits and purposes to promote and secure the rights of his neighbors.]

2. Tort duties negative—Breaches positive.—[It is the foundation of liability in tort that the defendant should have caused the harm in question. "Cause" in this connection means active interference. There must be some positive action, some choice of conduct, which determines the harmful result. One who is unwillingly carried upon another's land is not guilty of trespass. One who sees a man drowning, and with power to save him, does nothing, may stand idly by and laugh with impunity at the harm which ensues. Morally he may be little better than a murderer; but an action of tort does not lie for a mere non-

feasance. The law cannot undertake to make men render active service to their neighbors at all times when a good or a brave man would do so. Webb's Pollock, Torts, p. 532. For mere omission to do good as contrasted with active harm, we must refer to the law of obligations to find the basis of liability. In tort there must be found a voluntary act of interference on the part of the person to be charged; it is necessary that he should have actively led to the result, to be considered the author of harm. As Professor Wigmore points out, a person is a cause of a harm whenever by the exercise of his volition the harm occurred or would not have occurred. But he is not the legally responsible cause if his volition was exercised to remain merely passive, save in certain exceptional cases such as the situation of one in control of dangerous premises. Wigmore, Cases on Torts, p. 865, 866. Historically the primitive rule of responsibility is absolute for all harm actively and directly caused to another; but this strict rule is gradually limited, for the most part, to cases of intent and negligence, where the defendant caused harm culpably and is morally to blame. Accident is recognized as an excuse, save in certain exceptional classes of cases.]

3. **Proximate or remote cause.**—[If the facts are known, the question of whether one man killed another is ordinarily simple; yet it may be a very difficult question to tell whether some particular act of one man "caused" the death of another in a legal sense, or whether one should be held responsible for various harmful consequences which may seem to be connected with his conduct more or less remotely. Take the case of death resulting from a slight nervous shock, from improper treatment of a slight wound, from heart-break, or from exposure to infection by the defendant. III Stephen, Hist. Crim. Law, pp. 3-9. Is the connection clear and distinct enough to hold the defendant responsible civilly, or criminally, or is it too remote, obscure and accidental? Not only the question of liability in crime or tort, but the measure of damages both in tort and contract may depend on this vague and difficult question of proximate or remote cause. Thus, if a woman's husband desert her in consequence of a slander on her good name, does not the independent fault of the husband predominate over that of the slanderer? If a plaintiff loses his presence of mind, owing to imminent danger caused by the defendant, and blindly jumps before another vehicle by which

he is hurt, a question of "legal cause" may be raised. Is the defendant justly responsible? If the plaintiff's dangerous leap resulted from a rash apprehension of danger, the injury which is sustained is to be attributed to rashness and imprudence, not to the defendant; but due allowance must be made for his panic in the crisis. So if one is driven insane by injury and as a result of such insanity injures himself, there may be a question of remoteness of damage. If one leaves his horse and cart unhitched and unattended and the horse is struck willfully by some stranger, there is a question of whether or not, by the intervening of the third person's act, the connection of injury and negligence was broken. Various legal tests have been suggested as to where in such cases the line should be drawn: (1) the Probable Consequence Rule, or what ought to have been foreseen; (2) the "But for" Rule; (3) the Proximate and Natural Consequence Rule; but no satisfactory formula or rule seems attainable. It is not a logical question of causation. A more or less arbitrary and practical circle must be drawn. Is the defendant substantially to blame under the circumstances, or is it unreasonable to hold him for such a remote, disconnected, and unlikely occurrence? The question is usually one for the jury to decide in their discretion on all the facts, whether the defendant's position was such that his exercise of volition makes him in fairness responsible for the harmful consequences of his act, measuring his opportunity of avoiding them by the mental and moral capacity of the ordinary adult in the community. Was the ultimate harmful consequence so probable that the defendant ought morally to have refrained from acting in view of the risk of harm? Thus, as Wigmore points out, the varying degree of probability is the implication in the terms "remote" and "proximate." Wigmore, Cases on Torts, p. 869. The defendant is responsible if he ought morally to have refrained in view of the probability or danger of harm under all the circumstances as he knew or ought to have known them.]

4. Responsibility for intentional harm.—[Every person is under legal duty to refrain from invading or interfering with the person, property or rights of another by a voluntary act, whether or not with evil intent. The law began by allowing remedies for violent and then for non-violent injuries, and it has now practically arrived at the general principle that it is a legal wrong

to do any willful harm to the rights of one's neighbor, unless there be justification or excuse. Pollock, Torts, p. 23.]

Justification and excuse. [There are divers things a man may freely do for his own ends, though he well knows that his neighbor will in some way be the worse for them. Self-defense, competition in business, the privilege of fair comment, are illustrations of cases where the duty to respect the rights of another is for the time being suspended. These cases where a man is privileged knowingly and intentionally to inflict harm vary according to the nature of the affair. While not a question of the existence of right, but of the suspension of duty, yet justification, excuse and privilege are best considered in connection with the various kinds of harm and legal rights. Claims of privilege are largely based on considerations of public policy and the balance of conflicting interests. Conditions excluding liability for acts intentionally causing harm to legal rights have been discussed in connection with injuries and the extent of protection accorded to rights.]

5. **Civil compared to criminal responsibility.**—[The standard of criminal responsibility in modern law is different from civil. *Mens rea,* the accountable mind, which is the condition of criminal guilt and liability to punishment, involves generally culpability, conscious wrong, malice, dishonesty, or wickedness. But malice, in the sense of wicked motive or purpose to do wrong, is in general unnecessary to tort liability. The question here is not whether the defendant deserves to suffer punishment but whether there is any reason to make the defendant rather than the plaintiff bear the loss which has resulted from his act. We shall see that the fact that he did not know that his conduct was wrongful or intend any harm is no defence. Malicious motive may, however, be very material on questions of privilege or justification, and take away the exceptional immunity which might otherwise exist in the case of a legitimate motive or purpose.]

6. **Moral standard in modern law.**—[Unavoidable accident or misadventure was in early law no excuse from either criminal or tort liability. The law tended to look rather at the acts of the parties, and the resulting damage, than at their moral or subjective condition. A man who accidentally or in self-defense killed another, was guilty of a crime. In medieval common law

a man acted at his peril. He was liable civilly in damages for the harm which he inflicted, whether intentional, careless or accidental, and there was no attempt to try his intent. The fact that the defendant had acted directly to the damage of the plaintiff was considered to call for satisfaction. III Holdsworth, History English Law, p. 306. In modern law the moral power of avoiding the evil is considered rather than action alone. A man must in general be given a fair chance to avoid or prevent harm before being held responsible for it. The question is not only, did the defendant do the physical act which damages the plaintiff, but also was the act careless or negligent toward the plaintiff? The burden is now placed on the plaintiff to prove the act intentional or negligent; it is not for the doer of harm to excuse himself by proving it to be accidental. In some cases, however, the injury speaks for itself (res ipsa loquitur) and the very circumstances of the thing call for explanation by the defendant, as if he leaves his horse unattended in the street and it runs away. Often a slight showing by the plaintiff will raise a presumption of negligence which must be rebutted by the defendant.]

7. **Mistake versus accident.**—["The general principle of our law is that loss from accident must lie where it falls" and there is no insurance of others against the harmful results of my activities. Holmes, Common Law, p. 94. But the fact that the defendant acted under mistake of fact or in bona fide ignorance of the plaintiff's rights, or from good intentions, will not excuse voluntary interference with the person, the property, the reputation, or the rights of another. Mistake of fact is no defence in tort, though it may be to criminal liability. "If I trespass upon another man's land, it is no defence to me that I believed it on good grounds to be my own. If, intending to arrest A., I arrest B. by mistake instead, I am liable notwithstanding the greatest care taken by me to ascertain his identity. If I falsely, but innocently, make a defamatory statement about another, I am liable to him, however careful I may have been to ascertain the truth." Salmond, Jurisp., § 147. "It appears morally unreasonable at first sight, to require a man at his peril to know what lands and goods are his neighbor's, but it is not so evidently unreasonable to expect him to know what is his own, which is only the statement of the same rule from the other side." Pol-

lock, Torts, pp. 10, 16. "Where a man goes upon his neighbor's land, thinking it is his own, he intends the very act or consequence complained of. * * * It is a very different thing that he who intentionally does a thing must bear the loss, from saying that one who causes harm accidentally, which he could not foresee, must bear it."[1]]

[Exceptional privilege to innocent mistake is allowed to defamation on privileged occasions, to arrest on reasonable suspicion, and to criminal prosecution in good faith. But the delivery by a carrier to the wrong person by mistake, the purchase of goods from a seller without title in good faith, the mistaken mowing of plaintiff's grass, or cutting of his trees, are treated as intentional wrongs, and oblige the doer to repair the damage caused by his act though without moral fault on his part.]

8. Responsibility for negligence.—[The law requires more of a man than to abstain from intentional harm. He must not be rash, heedless, or negligent toward the rights and interests of others. Every person is bound to use ordinary care, consideration and skill to avoid injury to another; he is responsible in damages for all harm occasioned by the want of ordinary care or regard for the rights of others in his management of his person, property, business, or activities in general. The fundamental principle as to the existence of a duty of care is this: Whenever one is placed in such a position with reference to another that he ought to see or know that there is danger of causing him harm by what he does, there arises a duty to use reasonable care, consideration and precaution to avoid causing such harm. The duty arises from the existence of the situation or relation between the parties in which the act of one may affect the other, and in which care or respect for the other's rights and interests is necessary. In the case of intentional harm, the disregard of the plaintiff's interests is obvious, and it is for the defendant to excuse or justify his act. In the case of unintended harm, the plaintiff may have difficulty in showing that the defendant failed to show the care and consideration justly due him under the circumstances.]

9. Standard of care.—[Negligence is not a distinct tort; but expresses the responsibility factor, the improper disregard for safety, the lack of consideration for the rights of others, result-

[1] Holmes, Common Law, 94-97.

ing in harm, which ought to have been avoided. It is the unintentional acting to another's harm, through failure to observe that degree of care, precaution, or vigilance for the safety of another's person, property, or rights, which the circumstances justly demand. Negligence is thus a relative thing; it varies with the apparent risk or degree of danger to others which attends the action, and the opportunity of the defendant to guard against it.]

External standard. [Mr. Justice Holmes has emphatically pointed out that the law of torts does not go into the question whether the defendant himself was culpable. It applies an external standard and demands that regard for the safety of others which could be expected of the average man, the man of ordinary intelligence and prudence, and determines liability by that. To quote from Mr. Justice Holmes: "The standards of the law are standards of general applications. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. * * * When men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account." Holmes, Common Law, p. 108.]

10. **Incapacity as an excuse.**—[There is some doubt as to the rules which govern the responsibility of a lunatic or insane person for damage which he has caused to another, intentionally or negligently. If he has foresight and power to take precautions, though insane, he is then responsible civilly and criminally as other men. But if his idiocy, dementia, or mania incapacitates him from intelligent choice, this is certainly a defence to punishment, though perhaps not to liability for damages in tort. The German code authorizes the court to order such compensation as seems equitable under the circumstances, having regard especially to the relative wealth or pecuniary situation of the

parties. This makes possible the compulsory contribution by the rich lunatic to the poor victim of his misfortune, while the lunatic is not to be deprived of the means of sustaining himself and others dependent upon him. See Ames, Law and Morals, 22 Harv. L. Rev. 97.]

[An infant is liable for his torts, though if he is plaintiff the rule of contributory negligence is relaxed in his favor. The old, the lame, the blind, and infirm are not precluded from the use of the streets and cars, and more care must be exercised toward them, while less care can be expected from them; though they should consider their infirmity in regulating their actions. On the other hand, those professing to be physicians or to have exceptional skill are held to such higher standard for the protection of others.]

11. Specific rules of responsibility—The occupier of land.—[The exposition of the duties of care in different relations belongs to a detailed treatise on the Law of Torts. We may take briefly as an example, however, the duties of an occupier of land or buildings toward his neighbors, passersby, invited persons, licensees and trespassers. (1) To invited persons, customers, guests and servants he owes a duty to keep his premises in reasonably safe and suitable condition for use, and must use due care to discover latent defects which exist. Thus he must guard their safety against such dangers as pitfalls, trap doors, elevator shafts and excavations. They are said to assume the ordinary risks of getting hurt upon the premises. (2) As to licensees, persons present merely by permission, with no reciprocal advantage to the owner, there is merely a duty to warn them of concealed danger, but no duty to make the premises safe. (3) As to trespassers, there is no duty to keep the property in repair, or give warning, but he must exercise regard for their safety after their presence is known, for example, toward a trespasser on a railroad right of way. In some states, according to the so-called "turn table cases," the occupier is liable for accidents from dangerous machinery to trespassing children, where the machinery is so specially attractive and accessible as to lure them into danger, and is left unlocked and unguarded. (4) To neighbors and passersby, using the adjacent public way, the occupier is liable for nuisances and for excavations which endanger public safety.]

12. Defence of contributory negligence.—[It is the rule of the common law that where a man is injured by the fault of both himself and of another combined, such other has a defence. What is the rational basis of this rule? On this there is great debate. It seems to rise from motives of fair play and public policy. A man cannot complain of others if they use the same sort of care toward him that he uses for himself. Thus if a railroad company be bound to use very great care not to endanger a passerby at a railroad crossing, why is he not bound to use equally great care not to be endangered? His care should be as much graduated by the danger as that of the company. It is unjust to require more of others than one will do for himself. Accordingly we have the rule of rough justice that if the plaintiff could have avoided the injury if he had used due care for his own safety, he cannot complain of someone else's negligence which also contributed. He has established his own standard of care.]

13. Last clear chance rule.—[If notwithstanding the plaintiff's putting himself in harm's way, the defendant has the last opportunity, with reasonable care, to avoid hurting the plaintiff at the critical moment, the latter does not come within the severe rule of contributory negligence. A man does not forfeit the future protection of the law by previous acts of carelessness, if the defendant knew or ought to have known his danger. It is only where concurring and simultaneous want of care on both sides combines to result in harm that a plaintiff comes under the ban of contributory negligence.]

14. Comparative negligence rule.—[The strict common law rule sometimes results in hardship, particularly where the plaintiff has merely failed to use ordinary care while the defendant has failed to use the slightest degree of care. The Georgia code adopts the rule that where the plaintiff is guilty of slight negligence only and the defendant of gross negligence that the plaintiff may still complain of the fault of the defendant, but the compensation is diminished. This is followed in the Federal Employers' Liability Act of 1908. It has generally, however, been considered impracticable to distinguish between different degrees of negligence.]

15. Situations of absolute liability.—[We have seen that intent and negligence are the general conditions of responsibility

for the harmful results of injurious activities. There are certain special situations of risk where the law imposes an absolute liability on the one who creates them even for accidents, though no actual fault or blame can be imputed to him, it being considered that the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken. These cases where a man is absolutely responsible and takes the chance of accidents happening are, for the most part, risks arising from dangers to which he subjects others for his own advantage. Such are (1) the possession of dangerous objects, such as firearms, explosives, and accumulations of water; (2) animals which will do damage if they escape; (3) the responsibility of the master for the wrongful acts of his servants; (4) the accidental consequences of illegal acts.]

16. Keeping animals.—[A man is absolutely responsible at common law for the trespasses of his cattle on the land of another. If his horse, ox, or pig escape from his own land to that of his neighbor, he is answerable for resulting harm without proof of negligence.[1] So the keeper of dangerous wild animals or domestic animals of known vicious propensity is absolutely responsible for damage done by biting, kicking, goring, or the like. It is said that a dog has his "first bite free"; before that there may be no "scienter" or knowledge of his evil disposition.]

17. Keeping dangerous accumulations or substances on premises.—[It was decided in the case of Rylands v. Fletcher (1868), 3 H. L. 330, where a mine was flooded by water which broke out from defendant's reservoir, that the defendant was responsible, whether or not he had used care in proportion to the manifest risk; and the doctrine was broadly laid down that one who for his own purposes and without the consent of the plaintiff brings on his land, collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril. If he fails to do so he is answerable for all the harm that is the natural consequence of its escape. The risk of taking sufficient precautions is thus cast upon him who creates the danger; yet he is excused from harm which results where it is caused by "act of God"

[1] It has been suggested that this rule is a relic of the ancient principle that a man is answerable for all damage done by his slaves and other property. II Pollock & Maitland, pp. 471-473; Salmond, Jurisp., § 148; Holmes, Common Law, pp. 11, 24, 25.

or calamity which no human foresight or skill could possibly anticipate or prevent, or by the intervention of a stranger. This exceptional liability is imposed only in cases of special risk, such as accumulations of water, filth, explosives, or dangerous animals. It is still doubtful whether or not the broad principle laid down in Rylands v. Fletcher, as to responsibility for accidental escape of dangerous things or accumulations, will be further established and extended, or limited and confined. The rule would not seem to extend to steam boilers or fire, but does extend to gunpowder and dynamite, even where so situated as not to amount to a nuisance per se. Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co. (1899), 60 Oh. St. 560; 54 N.E. 628.]

18. Absolute liability of master for servant's torts.—[An employer is liable to make compensation to third persons for the torts of his servants or employees while acting in the course of their employment, whether actually authorized or not. Both the servant and master are liable for the resulting damage, if the servant commit a tort incident to carrying on his master's business. This responsibility is imposed by the law, in the absence of authorization or command, on the basis of the relationship of master and servant, employer and employee.]

Reason of master's responsibility. [There is no single reason which is recognized as the true ground of this rule of respondeat superior. Where a master commands a wrongful act, obviously this is his own act. But where the servant commits a wrong, which the master has never authorized or consented to, which perhaps he has even expressly forbidden, it is a very strict rule of responsibility that holds the master liable. Yet the master alone, in a vast number of cases, has the intelligence, the power, and the foresight to control the situation which he has created. Take the management of a railroad, for example; it is necessary for the law to place the responsibility high up to secure efficient precautions and protection of private rights.]

Qui facit per alium, facit per se. [Accordingly it has become axiomatic that the act of the servant is the act of the master. The law imposes on the master the duty to keep his servants from damaging others in his business. He sets in motion, keeps in motion, and guides the activities of the servant for his own benefit and profit. Whether the acts of his employees are authorized or not, they must be controlled and regulated. The master

is therefore required to see that his affairs are conducted with due regard to the safety of others. He must maintain the discipline of his subordinates. Their acts are made his acts by law, and accordingly he must use all necessary precautions to look out for the results of such acts as if they were his own.]

19. Course of employment.—[The test of the relation of master and servant is found in the power of the master to order and control the other in the performance of his work. One who gets work done by contract is not ordinarily responsible for incidental injuries that occur through the fault of the independent contractor or his men, as he has no superintendence or control over them. Thus one is responsible for the negligent driving of his own coachman, but not for that of the cab driver, who is his own master. A master prescribes the work, and at all times may direct the mode and manner of doing it. One is only responsible in law for the acts of his creature or inferior, however, while under his orders. If we go back far enough we may find a time when a master was responsible for all the acts of his slaves, and a householder was responsible for the dependents of his household, who were subject to his authority and discipline.]

20. Departure from employment.—[Acts done by a servant aside from the purpose and not in the furtherance of the employment are beyond the control of the master. Where the servant entirely quits sight of the business and goes off on some "frolic" or purpose of his own, even though using the vehicle or property of the master, this deviation destroys the relation; the submission to the authority of the employer being repudiated, his responsibility is at an end.]

21. Liability of an employer to his own servants.—[A master is not liable at common law for injuries to a servant in the course of his employment which are the result of the negligence of a fellow servant, or of the ordinary risks of the business. There is a vast accumulation of cases upon this subject.]

Assumption of risks by servant. [It is said that the servant assumes the ordinary and usual risks and perils incident to his work when he accepts employment, whether he knows them or not, and also all those that become known to him. This is distinct from contributory negligence. Thus the workman assumes the ordinary risks of mining, unhealthy chemical fumes,

the use of dangerous tools and machinery and the operating of railroads. He must, moreover, make complaint and give notice if the premises get out of order; if he unduly acquiesces in the dangerous condition, he assumes the risk, and in case of accident the maxim *volenti non fit injuria* applies. This so-called assumption of risk is said to rest on implied agreement to assume the ordinary risks of the employment; any such agreement is ordinarily a pure fiction, which simply expresses the rule that the employer is not liable for all accidents where the servant voluntarily places himself in a position of danger. A man may decline dangerous employment, and if he voluntarily engages in it, he may not complain that it is dangerous. The servant, however, does not assume extraordinary and unusual risks of the employment, or latent defects in the machinery or appliances, but only those which are obvious, or of which he has knowledge, actual or constructive. The master is bound to use reasonable care to provide for the safety of his servants. He must furnish, so far as he is able, proper materials, appliances, and facilities for the work. He must keep his elevators, scaffolds, excavations, etc., in reasonably safe condition. It is his duty to warn and instruct minors and inexperienced workmen against latent defects and dangers which they do not understand. He must use due care in superintending the work properly and employing competent fellow servants. The employee does not assume the risk of his performing these "non-assignable" duties and supplying proper appliances or selecting proper superintendents and employees.]

Fellow-servant doctrine. [By harsh and arbitrary exception, a master is not liable to his own servants for injury received from the negligence or fault of a fellow servant. Strangers can hold the master responsible for controlling the conduct of his business through his employees, but one himself employed in the business is in a different position from the outsider. It is said that he does not need to place himself in that situation and if he does he will be deemed to have voluntarily taken the risk of negligent harm at the hands of his fellow servant, along with other risks naturally incident to the enterprise, which he has made his own. The fellow servant need not be doing the same kind of work if engaged in the common enterprise and employment. This rule is modern, dating back to the cases of Priestly v. Fowler (1837), 3 M. & W. 1, and Farwell v. Boston (1842),

45 Mass. 49. A common law exception has been attempted in some few states by the so-called vice-principal doctrine, abrogating the fellow-servant rule, where the servant is injured by the negligence of a general superintendent or superior standing in the master's place.]

22. Employers' liability acts.—[Statutes are being enacted in many states by which "all questions of fellow servant are wiped out at one sweep of the legislative pen." The tendency is to hold that the financial burden of unavoidable accidents should not be put upon the shoulders of workingmen who are least able to bear it, but on the employer whose business should bear the risk. These statutes frequently modify the law that employees are held to assume the risks arising from defective machinery and the ordinary dangers of the business, which is felt to have no rational application to modern conditions. The doctrine of contributory negligence is also being modified, so as to affect only the measure of damages and not the right to recover. This introduces the law of comparative negligence and an apportionment of damages according to full or partial responsibility. In most European countries employers of all kinds, particularly owners of factories, mines, and carriers by railroad or boat, are bound to compensate their employees for accidents of all kinds which happen in the course of their business, not due to the workman's own serious and wilful misconduct. The relief is so administered as not to be wasted in costly litigation.]

23. Accidental consequences of unlawful acts.—[If a defendant is doing an unlawful act, such as beating a horse, speeding an automobile contrary to an ordinance, or operating a machine or mine without safety appliances prescribed by statute, he is liable for damages caused thereby, and no further showing of negligence is required from the plaintiff, nor can the defendant shield himself under the plea of accident. This is particularly true when the statute was enacted to prevent the class of harm which ensued in the particular case. An analogy to this rule is found in criminal law.]

PART III

CRIMINAL LAW

CHAPTER XI.

FUNCTION AND SCOPE OF CRIMINAL LAW.

1. **From torts to crimes.**—[In our undertaking to examine the great outlines of the common law, we turn from the law of torts to the criminal law, which guides the administration of punishment upon wrongdoers. While this may at first sight seem to interrupt the current of our discourse, yet it is justified by the early historical connection between the law of torts and crimes, and the advantage of contrasting civil injuries with criminal offences, and comparing liability to private redress with liability to punishment. It is highly important that the true place and function of criminal law in the legal system should be well understood.]

The branches of criminal law. [In every criminal prosecution it is first necessary to prove the commission of some criminal offence, the doing by someone of an act which is punishable, and then, secondly, to fasten this offence upon the accused person. Criminal law which governs the administration of punishment thus divides itself into three great branches: (1) the definition of offences which are punishable; (2) the principles of criminal responsibility or guilt; and (3) criminal procedure, or the methods of prosecuting an accused person to conviction. The sequel to these, which is associated with them, though not properly included in criminal law, is the penal treatment which is to be given to those convicted. We must first briefly consider the administration of criminal justice and the purpose of punishment, and shall then take up the definition and species of criminal offences and, lastly, the principles of accountability to punishment.]

2. Public and private wrongs.—[Blackstone states that the distinction between crimes and torts seems principally to consist in this: that torts are private wrongs, the infringement or privation of the rights of individuals. Crimes are public wrongs, a breach and violation of public rights and duties owing to the whole community, in its social aggregate capacity. While this distinction is still currently accepted by many, it has been clearly pointed out that it is insufficient. Many public wrongs are not crimes, as for instance, the non-payment of taxes, the breach of public contracts, trespass on public property, in which public rights are protected by civil remedies on the same basis as private rights. Conversely, many crimes are not public wrongs, and we see that the criminal law frequently concerns itself with the punishment of private wrongs.]

[Crimes are public offences in the sense that they are punished, not for the sake of the particular victim or offender, but for the public benefit and protection in general. The public prosecutes criminal offences, owing to the fact that where the criminal remedy of punishment is left in the hands of the individuals injured, it tends to degenerate into the civil remedy of pecuniary compensation. Even at the present day, for the protection of the law of crime, it is necessary to prohibit as itself a crime, the compounding of a felony. Salmond, Jurisp., § 27.]

Crime or tort. [To ask concerning wrong, "Is this a crime or is it a tort?" is no wiser, as Stephen points out, than to ask concerning a man, "Is he a father or a brother?" for he may well be both. The difference between crimes and civil injuries does not consist of any inherent or intrinsic difference in the nature of the wrongful acts themselves, but only in the sanctions which the state applies against the offender, either to redress or punish the wrong. The law may impose both sanctions if it likes; a crime then may be defined simply as being a punishable offence. In the majority of cases wrongs which are punished criminally are such as cause actual hurt to the person or property of another man and give rise to a private remedy also. Blackstone goes so far as to say that every crime includes also a private injury; but there are offences which do not infringe the rights of any individual. Such are crimes against the public interest, or where the criminal is himself the sufferer. Many objectionable acts are made punishable where there is no invasion of right.]

3. Test of criminality.—[The general condition of civil liability is infringement of private right. There is no test, however, no distinctive peculiarity, by which one can readily ascertain, as a matter of legal principle, whether or not an act is a criminal offence, even though it be a civil wrong. Not all deliberate or wicked transgressions are criminal. We cannot go much beyond the rough generalization that criminal punishments have from time to time been imposed where the courts or the legislature have come to regard mere civil remedies as inadequate protection to private or public interests.]

Selection of criminal offences. [Why these particular acts are picked out by the law as punishable, depends on various reasons, some instinctive, some accidental and historical, some merely of convenience and policy. There is no general principle that the man who deliberately does what he knows to be wrong, cruel, or dishonest, and contrary to legal right, is punishable. Certain offences, such as treason, murder, and robbery, must obviously be criminal. Self-preservation demands their punishment, since society cannot possibly exist when such wrongs are allowed to escape punishment. But with regard to many wrongs it must be left to the legislature to decide whether they shall amount to a crime, and whether, on the other hand, the welfare of society may not be sufficiently preserved by private remedies, as in the case of trespass on land and breach of contract.]

Scope of criminal law. [We shall find that the scheme of criminal offences is empirical, haphazard, sometimes incomplete, and not the result of careful forethought and planning. Crimes are, in general, those grave offences which excite resentment, produce revenge, and so are immediately destructive to the peace and good order of society. The line between offences which are properly punishable by law and those which may be remedied by civil action alone, is somewhat arbitrary. Some offences are *mala in se,* showing dangerous moral turpitude and violating our feelings of security and pity; some are *mala prohibita,* violations of mere positive regulations of policy and social welfare enforced by a penalty. Criminal law is primarily concerned with the punishment of acts intrinsically harmful, vicious, and condemned as evil by social sentiment for their enormity and destructive tendencies. Criminal law is not confined, however, to the punishment of wrongful or unjust acts; it extends to the

restraint, regulation, or prohibition of acts in themselves comparatively innocent and harmless, for reasons of public policy, where punishment is a means of the enforcement of public control. There must always be much that is arbitrary, both in the choice and definition of offences which shall be punished. The process of adding criminal offences by our legislation goes forward every year, as punitive measures are felt necessary.]

4. Definition of offences by statute.—[Originally the definition of all offences was by "unwritten" law, or precedent, and the common law thus supplies a number of leading definitions which have been adopted by statute, and may be called "Common Statute" crimes, some very comprehensive, some very specific. The courts no longer have power to punish new offences for which there is no precedent, such as they had in the earlier stages. The protection of the criminal law for the life and property of individuals and the public peace is sufficiently developed, and further extensions may be left to the legislature. In many states all criminal offences are now defined in penal codes or by statutes, though the statutes can only be interpreted in the light of the common law definitions, *e. g.*, treason.]

5. Rules of responsibility depend on common law.—[It is one thing to say that no one shall be punished, unless his misconduct is explicitly defined and condemned by written law. It is another thing to say that no excuse shall be admitted for these offences, unless it is explicitly provided. The accused ought to have the benefit of the full discussion of all possible defences, upon principle and analogy, before he is punished for the crime, *e. g.*, necessity, compulsion, insanity. The courts may decide such cases as they arise, and there is no need to limit the judicial power. It is better to await the light which may be thrown on them by the ingenuity, arguments and research of counsel, than to attempt to lay down rules beforehand, and gain a fallacious appearance of completeness in the penal code. Any circumstances which may be a justification or excuse and a defence to any charge ought to remain largely a matter of common law. III Stephen, Hist. Crim. Law, pp. 360-361.]

CHAPTER XII.

GRADATION OF CRIMINAL OFFENCES AND THEIR PUNISHMENT.

1. **Felonies and misdemeanors.**—[Offences which are deeper and of a more atrocious dye have from the most ancient times been marked off by the common law from all minor offences, the severity of punishment being proportioned to the magnitude of the offence. Such crimes were called "felonies." "Trespass" was used in contrast to felony; the present name "misdemeanor" for minor offences being of comparatively modern use. In the Middle Ages, there was no such term as misdemeanor. Wrongs which did not amount to felony were trespass. Trespass was a semi-criminal action, founded on the breach of the king's peace.]

Import of felony. [Felony is the name for the worst crimes, probably from the adjective "felon," meaning cruel, fierce, wicked, base. In general it is as bad a word as you can give to a man or thing, and it will stand equally well for many kinds of badness, for ferocity, cowardice, craft. It imports gravity in the harm done and wickedness in the doer, but is usually defined by the tangible test of its punishment and legal effects, rather than by the quality of the criminal act. II Pollock & Maitland, Hist. Eng. Law, 466.]

2. **Effect of felony.**—[Felony, according to Blackstone, comprises every species of crime, which occasioned at common law the forfeiture of lands or goods; and for which capital punishment was inflicted, except in the case of petty larceny and suicide. If a crime were made felony by statute, the use of the name implied punishment of death, subject, however, to the benefit of the clergy. Felony is then a generic term for the group of graver offences which were marked off from all minor offences by severity of punishment and certain differences in procedure.]

[Forfeitures are abolished and we no longer punish all serious crimes by death or make the same provision for all the crimes

which belong to a certain grade. Yet crimes are still broken into these two great historical divisions, according to their greater or lesser heinousness and punishment, though in a somewhat inconsistent and illogical manner. Certain infamous crimes such as perjury, forgery, bribery, obtaining money by false pretences, have been classed as misdemeanors. Homicide, arson, burglary, rape, and grand larceny are among the more serious felonies. Libels, riots, assaults, common nuisances are misdemeanors. The desirability of having any such classification at all has been seriously doubted. II Stephen, Hist. Crim. Law, p. 194. Thus burglary may be a trifling form of theft, as if a man steals a loaf of bread from the door of a back-kitchen; or it may be a crime of the greatest atrocity, as if armed men break into a lonely dwelling-house in the country and ill-use the inhabitants. Robbery may mean something close upon murder, or something hardly differing from a common assault. There is no certain basis of the relative criminality of offences, except a study of the individual criminal after conviction.]

[Upon the distinction between felony and misdemeanor is made to turn the severity of punishment, the courts in which the offence is tried, the matter of arrest without warrant, and the facility of admission to bail.]

3. **Treasons.**—[Treason was anciently comprised under the name felony. High treasons were, however, slowly marked off from other crimes: (1) By their peculiarly ghastly punishment; (2) by the fact of being "unclergyable," while every felony was "clergyable"; (3) while the felon's land escheated to his lord, the traitor's land was forfeited to the king. Kings therefore wished to extend treasons at the expense of felony; the magnates resisted.]

[Treasons as a group of crimes had "a vague circumference and more than one center," one of which is indicated by the word "betray," another by the bond of fidelity or allegiance. II Pollock & Maitland, Hist. Eng. Law, pp. 500-503. The common law definition of treasons was so vague and elastic that they were early defined by statute, but even then they covered such offences as counterfeiting the king's seal or money, bringing false money into the realm, and some kinds of murder, such as the slaying of certain public officers doing their duty. In the United States, treason is not treated as a class of crimes dis-

tinct from felony, but as a particular offence against the political existence or authority of the state, in violation of one's allegiance, such as rebellion or revolution, or adhering to foreign enemies.]

4. Death for all felonies.—[A rational scale of crimes with a corresponding scale of punishments, descending from the greatest to the least malignity, was not achieved by the common law, which assigned penalties of the first degree to offences of an inferior rank, and made little distinction in the nature and gradation of guilt between different offences, or between different instances of the same offence, applying the ultimate sanction of death to all felonies, "like a cruel surgeon who cuts off every limb, which through ignorance or indolence he will not attempt to cure." Sir James Stephen, Hist. Crim. Law, 190; IV Blk. 18.]

Effect of excessive punishment. Punishments of unreasonable severity have less effect in preventing crimes than such as are more merciful, yet properly intermixed with due distinctions of severity. Crimes are more effectually prevented by the certainty than by the severity of punishment. Blackstone enumerates one hundred and sixty offences at common law which were punished by death. This excessive severity and frequency of capital punishment in such ordinary cases as all theft above the value of twelve pence, produced very unfortunate results in the development of our criminal law. For, when punishment surpasses all measures, the injured, through compassion, will often forbear to prosecute; juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence; and judges, through compassion, will find technicalities to liberate one-half of the convicts. Among so many chances of escaping, the hardened offender overlooks the multitude that suffer: he boldly engages in his desperate attempts, and if unexpectedly the hand of justice overtakes him he deems himself peculiarly unfortunate.

5. The criminal law and reform of punishment.—[Much question is being made in these days whether the administration of criminal justice proceeds on a sound, scientific basis, and whether we are not still blindly employing the methods of the barbarous past. It is indeed a crying need that the administration of punishment should be made more scientific and enlightened, and should accomplish as much good as possible in the cir-

cumstances of the individual case. These, however, are problems of penology, rather than of criminal jurisprudence. The lawyer is concerned with the definition of offences which require punishment, and how to fix them upon the offender. The penal treatment of the offender, when you have caught and convicted him, is an administrative question for the penologist and criminologist, and not primarily a legal question for the lawyer. It is indeed a problem for which no one has sufficiently taken the responsibility, and one which has been treated very poorly by the courts and prison wardens. Courts have been so much busied and preoccupied in proving guilt, that they have had little opportunity to consider what to do when guilt is established. No stable theory on the subject of punishments seem to have been worked out, and we are at sea as to first principles. With a view to what objects are penalties to be awarded? This is an unsolved problem, yet it is for the science of penology, and not for the lawyer or jurist to determine penalties and the method of their administration.]

6. Change in character of punishments.—[Formerly the penal consequences of crime followed mathematically as a corollary of conviction. Some of the punishments provided were as follows: (1) Death and forfeiture for all felonies, subject to benefit of clergy; (2) Corporal punishment and mutilation, including whipping, pillory, stocks, ducking, putting out of eyes, scalping, cutting of ears, lips, noses, hands and feet; (3) Banishment and compulsory residence in exile; (4) Imprisonment with or without hard labor; (5) Loss and forfeiture of property; (6) Civic degradation and loss of political rights; (7) Divorce and loss of family rights. We are getting away from the idea that the law should set a definite price on every crime, and we allow extensive discretion within wide limits to judges in imposing sentence for all crimes, except treason and murder. Children are more and more being dealt with in special courts for juvenile offenders, and are put under a system of probation to overcome wayward tendencies, as a substitute for a definite penal sentence.]

[So in the case of adult offenders, the treatment should be guided not merely by the particular offence, but also by wider consideration, such as (1) character, age, personality, and possibility of reformation; (2) the effect on dependents of the

criminal, particularly his wife and children; (3) repentance and expiation, as shown by restitution and recompense to the victim and indemnity to those injured for the ill effects of the crime. Habitual, hardened, irreclaimable offenders; hereditary degenerates; incorrigible rogues and moral perverts, who habitually live by deceiving and robbing others, should be permanently confined, or imprisoned, as a bane to human society, instead of setting them free to continue a life of crime. With the indeterminate sentence and a system of probation, parole, and expert supervision, it will be possible to make a proper classification and study of criminals.]

7. **Resumé of punishment.**—[We have seen that punishment is governed by very complex and conflicting considerations, subjective and objective. In the first place, we must consider the public danger and the actual mischief of the offence. The one great object of criminal law is to protect society and satisfy the instinct of self-preservation against evil-doers. Criminal justice expresses the righteous indignation and condemnation of society to an extent measured by the severity of punishment, which must be adequate to the shock which the offence gives to public feeling. It must, therefore, be felt to be a just equivalent for what the offender has inflicted.]

[In the second place, in inflicting punishment we must consider the degrees of moral guilt in the offender, not with misplaced tenderness, but with discriminating severity. The greater the moral guilt, the greater the severity of punishment. It is not just that a young person of previous good character should, by an unbending rule of law, or a fixed sentence, receive the same punishment for his first offence as those wretches, fallen into hopeless depths of moral depravity, whose wickedness is altogether unpardonable and irretrievable, and who are confirmed enemies of their kind.]

[It would seem evident that the legal questions of defining criminal offences, and what excuses ought to be admitted for them in a court of law are distinct from the science of what principles ought to regulate the infliction of punishment. It is not for the legislature to fix the time of penal servitude or confinement, nor the manner in which punishment should be carried into execution, nor should the judge, in his discretion, fix an absolutely determinate sentence, like a judgment for damages. Improve-

ments in the definition of offences, and the creation of degrees with maximum and minimum punishments are not sufficient. Definitions apparently simple cover offences utterly dissimilar and deserving of widely different punishment, as murder and manslaughter, which must always vary indefinably in degrees of guilt. There should be some permanent board of experts by whom mercy may be shown and discretion and intelligence exercised, as to the length and severity of punishment.]

CHAPTER XIII.

OFFENCES AGAINST THE PERSON.

1. Definition of criminal offences.—[The power of punishment is exercised only under circumstances and conditions specified by law and is subjected to very rigid and explicit regulations. This necessarily leads to technical distinctions between what does and what does not amount to a criminal offence. What wrongs are punishable is determined not by general principle, but by the arbitrary and painful method of definition and enumeration. The definition of criminal offences has, more than any other branch of the law, developed by statutes, and has always been difficult to extend by judicial decision, owing to the dread of infringing the liberty of the subject. The unpopularity of the Court of Star Chamber shows the difficulty in allowing courts discretion to punish offenders according to their deserts; while the extension of civil remedies by the Court of Chancery encountered no such resistance.]

2. Treatment of criminal offences.—[We shall not attempt herein to recount in detail the elements and ingredients that enter into the definition of all the various crimes, defined by common law, or by statute, as being worthy of punishment. We may simply note in general that they consist of certain definite overt acts, capable of being distinctly proved, usually including some specific intent, *i. e.,* some evil motive, design, or purpose, such as malice or intent to defraud, specified in the definition of the offence. We shall glance at some of the more noteworthy offences among the common law crimes, which are *mala in se,* and not merely *mala prohibita,* and then proceed to consider the criminal responsibility of the offender for his acts, a matter which depends almost entirely on common law principles and not upon arbitrary definitions.]

3. Classification of criminal offences.—[Having considered in previous chapters the general nature and purpose of criminal law and of punishments, and the gradation of offences, we now

proceed to inquire into the different classes of criminal offences. These may be divided into: (1) Offences primarily concerning individuals; (2) Offences of a general or public nature. Public offences may be divided into: (a) Attacks on the political constitution, freedom and safety of the state; (b) Abuses and obstructions of public authority, such as the administration of justice, the exercise of legislative and executive power, and of political rights; (c) Acts injurious to the public in general, affecting the peace, health, decency, good morals, and social and economic well-being of the people at large. This class includes police regulations, or *mala prohibita,* acts in themselves indifferent which are made penal by positive regulations, as well as acts which are *mala in se.*]

[Offences against individuals may be divided (after the manner of injuries in tort) into: (a) Offences against the person; (b) Offences against the habitation and property; (c) Offences against personal relations; (d) Offences against a man's general activities. This classification of offences is one of convenience merely, and cannot be strictly carried out; for example, adultery, bigamy, and abortion may be classed either as public offences, or as offences against individuals. Abortion may be regarded as an offence against the rights of an infant *in ventre sa mere,* a wrong against the mother, or as a wrong against society, by interfering with the process by which the human race is propagated and continued. Libel is classed by Blackstone as an offence against the public peace rather than as an offence against the person, libel being made criminal because of its direct tendency to stir up a breach of the peace.]

4. Various offences against the person.—[The crimes which more immediately affect a man's person are: (1) Felonious homicide in its degrees of murder and manslaughter; (2) Mayhem, disabling a man by depriving him of an eye, tooth, hand, or other member useful for fighting, a felony at common law; (3) Assault, battery, and wounding, which are misdemeanors at common law; (4) Rape, the ravishment of a woman forcibly and against her will, a felony; (5) False imprisonment, kidnapping and abduction, misdemeanors.]

Felonious homicide. [Of all crimes against private persons, the most important is the offence of homicide, or causing death, in its several degrees of guilt, and of this we shall speak more in

detail. Homicide may be felonious, excusable, or justifiable. Criminal, or felonious homicide is the killing of a human being without legal justification or excuse. This may be done either by killing one's self or another person, including a child born alive.]

5. **Suicide.**—Self-murder is a peculiar species of murder, being the intentional putting an end to one's own existence. Death puts the self-murdered (felo de se) beyond the reach of all punishment, though after a coroner's inquest his family were formerly made to suffer by his ignominious burial in the highway, with a stake driven through his body, instead of in the churchyard, and by the forfeiture of his goods and chattels to the king, in the hope perhaps that such consequences would be some motive to restrain a man from so desperate and wicked an act. These penalties upon the innocent family are now removed. Suicide admits of accessories before the fact, as well as other felonies, and if one persuades another to kill himself and he does so, the advisor is guilty of murder.

To kill a child in its mother's womb or only partly delivered is not murder, although procuring an abortion after she is quick with child is a misdemeanor at common law, but if the child be born alive and is killed by exposure or otherwise, or dies as a result of injuries inflicted before birth, it is murder.

6. **Murder.**—Criminal homicide is divided at common law into murder and manslaughter. Murder is the unlawful killing of a human being with malice aforethought. All homicide is presumed to be malicious and amounts to murder, unless where justified by the command or permission of the law; excused on account of accident, mistake, self-defence, compulsion, or other excuse, or alleviated into manslaughter by being either the involuntary consequence of some act not strictly lawful, or if voluntary occasioned by some sudden and sufficiently violent provocation. When once the killing by the defendant is proved, it is incumbent upon the prisoner to make out these circumstances of justification, excuse, or palliation to the satisfaction of the court and jury, unless they appear from the evidence of the prosecution, for all homicide is presumed at common law to be murder, until at least a reasonable doubt to the contrary appears upon evidence.

7. Malice aforethought.—The name of murder was anciently applied only to the secret killing of another. Murder became, in time, the name of all the worst kinds of homicide, and the expression "malice aforethought" was adopted as the grand criterion which distinguishes murder from other killing. Homicide was thus finally divided into two main branches, murder and manslaughter, unlawful killing with or without malice aforethought. The punishment of murder and that of manslaughter was formerly the same, but by statute, benefit of clergy was taken away from murder, while only illiterate persons continued to be hung for manslaughter.

[It must not be supposed that the expression "malice aforethought" signifies a deliberate act of slaughter, as where one would deliberately and designedly kill another. The word "aforethought" is practically unmeaning. All killing is murder, whether intentional or unintentional, unless there be something at least to palliate the guilt. "Malice aforethought" indicates such wickedness attending the act as cuts off all excuse; it does not necessarily indicate any deliberation, spite, or intent, but means simply the absence of anything to mitigate or extenuate the guilt, such as dire provocation. It may exist where the killing is unpremeditated and unintentional. Accident is no excuse if it be the result of any wicked or felonious action. Thus, if one intends to inflict grievous bodily harm upon another person, or acts with gross negligence where there is danger that the act will probably cause death or grievous bodily harm to some person, and designedly kills a man, this is murder. So in the commission of any felony, as arson, burglary, or rape; if one accidently kills a man, he is guilty of murder. Likewise resisting by force a peace officer in making an arrest, or dispersing an unlawful assembly, negatives all excuse for killing. (II Stephen, Hist. Crim. Law, p. 119.)]

8. Degrees of murder.—[By modern legislation, the law recognizes degrees of murder, though there were none at common law, including under the first degree, deliberate, premeditated killing, evidenced by lying in wait, former menaces, or a concerted scheme, such as the use of poison. The first degree usually includes also accidental killing as the result of violent felony, rape, mayhem, burglary, arson, or robbery. All other murders are of the second degree, and the burden is on the

state to prove murder to be of the first degree. The death penalty is inflicted only for atrocious murders of the first degree.]

9. Voluntary manslaughter.—[Manslaughter is the unlawful killing of another without that "malice aforethought" which admits of no palliation. The distinction between the two forms of unlawful homicide is obscure and intricate, and it is difficult to enumerate what mitigating circumstances reduce felonious homicide from murder to manslaughter. We have seen that the absence of intent to kill is not the test by which the less guilty forms of criminal homicide are distinguished. Manslaughter has two branches: that committed voluntarily upon a sudden heat or provocation; and that committed accidentally, but through negligence or in the commission of some unlawful act.]

Provocation may be sufficient to extenuate the guilt even of intentional homicide, and reduce the degree of criminality to manslaughter, if sudden and sufficiently violent to deprive an ordinary person of the power of self-control. If upon a sudden quarrel two persons fight in hot blood on the spot, and one of them kills the other, this is manslaughter; and so it is if they, upon such an occasion, go out and fight in a field; for this is one continued act of passion; but a fatal duel in cold blood is murder in the victor as well as in the seconds of both parties. So also if a man be greatly provoked, as by pulling his nose or other great indignity, and immediately kills the aggressor, though this is not excusable (since there is no absolute necessity for doing it to preserve himself), yet neither is it murder, for there is some mitigation of guilt. But in this and every other case of homicide upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder. But if a man takes another in the act of adultery with his wife, and kills him directly upon the spot, this is manslaughter.

No affront by words or gestures only is a sufficient provocation to excuse or even to extenuate killing. Neither may one strike, shoot, or stab trespassers for coming on his premises, but may only use force not extending to blows and wounding, unless personally assaulted.

10. Accidental manslaughter.—Accidental homicide is excusable if the killing be the result of innocent and blameless misadventure; but accidental homicide will be either murder or manslaughter if it be the result of culpable negligence, or of the commission of an unlawful act. In the case of negligence, such as careless driving or riding, careless handling of fire-arms, shooting or throwing stones, the offence is usually manslaughter, although it may amount to murder where wanton recklessness is shown toward others.

Illustrations of negligence. If a workman flings down a stone or piece of timber into the street and kills a man, this may be either misadventure, manslaughter, or murder, according to the circumstances under which the act is done; if it were in a country village, where there are few passersby, and he calls out to all people to have a care, it is misadventure only; but if it were in London or other populous city, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all. So, too, if a man hath a beast that is used to do mischief, and he, knowing it, suffers it to go abroad, and it kills a man; even this is manslaughter in the owner; but if he had purposely turned it loose, though barely to frighten people, and make what is called sport, it is with us as much murder as if he had incited a bear or dog to worry them, as this shows wanton indifference to their safety.

11. Accidental fatalities from unlawful acts.—When an accidental killing happens in consequence of an unlawful act, distinctions may be made between (1) such acts as manifestly endanger the life of another; (2) those where only a slight degree of bodily violence is intended; and (3) those where no harm or violence to another person is foreseen. If a person unfortunately kill another by beating him, or striking him in such a manner as shows only an intent to chastise and not to kill him, the law so far considers the absence of intention to inflict grievous injury as to adjudge it only manslaughter and not murder, as if a man strikes another with his fist and death results; so if death resulting from the immoderate correction of a child or pupil, likely to do small injury only. But in case of intent to inflict grievous bodily harm, as by stabbing a man, or shooting at him, or doing acts dangerous to life, the absence of intent

to kill does not palliate the murder. In order that death resulting from an unlawful injury be deemed murder or manslaughter, it is requisite that the death result within a year and a day after the stroke is received or the cause of death is administered.

In the case of purely accidental homicide in the commission of an unlawful act, it depends upon the gravity and seriousness of the offence which occasioned it, whether it be murder or manslaughter. Death caused unintentionally is murder, if in the commission of a felony; but not from an unlawful act not amounting to felony or naturally dangerous to life, such as shooting another's chickens, with intent to steal them, which is manslaughter, though formerly said to be murder. One who is present, aiding and abetting an unlawful prize fight, is guilty of manslaughter, if one of the fighters is killed by a blow struck in the fight; even in a friendly game of foot-ball, if one of the players uses foul and uncalled-for violence, reckless as to whether it produce serious injury or not, it would be manslaughter, at the least, if resulting fatally.

CHAPTER XIV.

OFFENCES AGAINST PROPERTY.

1. **Offences against both person and property.**—Passing from crimes against the personal security of individuals, we come to such offences as more immediately affect their property. We shall first consider certain crimes of violence that affect both personal security and property, to wit: robbery, arson, and burglary.

2. **Robbery.**—Is the felonious and forcible taking of goods or money from the person or immediate presence of another by violence, by putting him in fear of violence and personal injury. The violation of the person by assault, makes the offence more atrocious than privately stealing, which is a mere injury to property.

3. **Arson.**—Arson and burglary are offences against the habitations or abodes of individuals to which the law gives special security and protection. Arson is the malicious and willful burning of the dwelling-house of another, or such other buildings as barns, stables, and out-houses, which are appurtenant to and connected with the dwelling, though not contiguous thereto.

This is an offence of very great malignity, because it invades the right of habitation and because fire is frequently the cause of death, and involves in the calamity persons unknown by the incendiary, and not intended to be hurt by him. We shall not enter into the fine distinctions as to what is such a house as may be the subject of arson at common law; it must be an occupied house, used as a place of residence. There must be a malicious burning, not one by negligence or mischance; the burning of any part is sufficient, though the fire be extinguished before the building is destroyed. The offence of arson (strictly so called) may be committed by willfully setting fire to one's own house, provided one's neighbour's house is thereby also burnt; but if no mischief is done but to one's own, it does

not amount to felony, though the fire was kindled with intent to burn another's.

4. Burglary—Nocturnal housebreaking.—Burglary, or nocturnal housebreaking, burgi latrocinium, which by our ancient law is called hamesecken, as it is in Scotland to this day, has always been looked upon as a very heinous offence; not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature. The law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity, but justifies killing the intruder who forcibly invades a man's castle under cover of darkness.

The definition of a burglar, as given us by Sir Edward Coke, is "he that by night breaketh and entereth into a mansion-house, with intent to commit a felony." In this definition there are four things to be considered: the time, the place, the manner, and the intent. The time must be by night, and not by day: for in the day time there is no burglary. As to what is reckoned night, and what day, for this purpose: anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but the better opinion seems to be, that if there be daylight or *crepusculum* (twilight) enough, begun or left to discern a man's face withal, it is no burglary. But this does not extend to moonlight; for then many midnight burglars would go unpunished, and besides, the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless. Housebreaking by day is a mere trespass at common law.

5. Breaking and entering.—There must be both breaking and entry to complete a burglary. But they need not be both done at once; for if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars. There must in general be an actual breaking: not a mere legal *clausum fregit* (breaking the close) (by leaping over invisible ideal boundaries, which may constitute a civil trespass), but a substantial and forcible irruption. As at least

by breaking, or taking out the glass of, or otherwise opening, a window; picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided. But if a person leaves his doors or windows open, it is his own folly and negligence, and if a man enters therein, it is no burglary; yet, if he afterwards unlocks an inner or chamber door, it is so. But to come down a chimney is held a burglarious entry; for that is as much closed as the nature of things will permit. So also to knock at the door, and upon opening it to rush in, with a felonious intent: or under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; all these entries have been adjudged burglarious, though there was no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. And so, if a servant opens and enters his master's chamber-door with a felonious design; or if any other person lodging in the same house, or in a public inn, opens and enters another's door, with such evil intent, it is burglary. Nay, if the servant conspires with a robber and lets him into the house by night, this is burglary in both; for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt.

6. Felonious intent.—As to the intent: it is clear that such breaking and entry must be with a felonious intent, otherwise it is only trespass. And it is the same, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary; whether the thing be actually perpetrated or not.

Nor does it make any difference whether the offence were felony at common law, or only created so by statute; since that statute which makes an offence felony, gives it incidentally all the properties of a felony at common law. Thus much for the nature of burglary; which is a felony at common law, but within the benefit of clergy.

7. Larceny.—The next species of offences are such as consist in the dishonest taking, misappropriation, or fraudulent obtaining of personal property, which may usefully be compared to torts infringing rights of property. The most important is larceny, or theft, by contraction for lactrociny, *lactrocinium*, which is distinguished by the law into two sorts: the one called simple larceny, or plain theft, unaccompanied with any other atrocious circumstances; and mixed or compound larceny, which also includes in it the aggravation of a taking from one's house or person.

And, first, of simple larceny, which, when it is the stealing of goods above the value of twelve-pence, is called grand larceny; when of goods to that value, or under, is petit larceny; offences which are considerably distinguished in their punishment, but not otherwise. I shall, therefore, first consider the nature of simple larceny in general; and then shall observe the different degrees of punishment inflicted on its two several branches.

Simple larceny, then, "is the felonious taking and carrying away of the personal goods of another." This offence involves both a trespass and a conversion. Fraudulent conversion by one already in possession is embezzlement.

At present we will examine the nature of theft, or larceny, as laid down in the foregoing definition.

8. The taking.—It must be taking from the possession of another. This implies the consent of the owner to be wanting. Therefore, no delivery of the goods from the owner to the offender on a bailment can ground a larceny. As if A lends B a horse, and he rides away with him; or, if I send goods by a carrier, and he carries them away; these are no larcenies. But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are larcenies; for here the animus furandi (with an intention of stealing) is manifest; since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. But bare non-delivery shall not, of course, be intended to arise from a felonious design; since that may happen from a variety of other accidents. Neither by the common law was it larceny in any servant to run away with the goods committed to him to

keep, but only a breach of civil trust. But if he had not the possession, but only the custody, care and oversight of the goods, as the butler of the plate, the shepherd of the sheep, and the like, the embezzling of them is felony at common law. So, if a guest robs his inn or tavern of a piece of plate, it is larceny: for he hath not the possession delivered to him, but merely the use. Under some circumstances, also, a man may be guilty of felony by taking his own goods: as if he steals them from a pawnbroker, or any one to whom he hath delivered and entrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on the road, with an intent to charge the hundred with the loss, according to the statute of Winchester.

9. The carrying away.—There must not only be a taking, but a carrying away; *cepit et asportavit* was the old law-latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away. As, if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs; these have been adjudged sufficient carryings away to constitute a larceny. Or, if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it; this is larceny.

10. Animus furandi.—This taking and carrying away must also be felonious; that is, done *animo furandi:* or, as the civil law expresses it, *lucri causa* (for the sake of gain). This requisite, besides excusing those who labour under incapacities of mind or will (of whom we spoke sufficiently at the entrance of this book) indemnifies also mere trespassers, and other petty offenders. A mere temporary borrowing of the horse or plough of another without his knowledge, intending to return it, is not felonious. As if a servant takes his master's horse without his knowledge, and brings him home again; if a neighbour takes another's plough that is left in the field and uses it upon his own land, and then returns it; if under color of arrear of rent where none is due, I distrain another's cattle, or seize them; all these are misdemeanors and trespasses, but no felonies. So, taking by mistake or under a bona fide claim of title negatives

the intent to steal, though the claim be unfounded. The ordinary discovery of a felonious intent is where the party doth it clandestinely; or, being charged with the fact denies it. But this is by no means the only criterion of criminality; for, in cases that may amount to larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent, or *animum furandi:* wherefore they must be left to the due and attentive consideration of the court and jury.

11. **Only personal property protected.**—This felonious taking and carrying away must be of the personal goods of another; for, if they are things real, or savour of the realty, larceny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things, likewise, that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass which depended upon the subtility in the legal notions of our ancestors. These things were parcel of the real estate; and, therefore, while they continued so, could not, by any possibility, be the subject of theft, being absolutely fixed and immovable.

And if they were severed by violence, so as to be changed into movables; and, at the same time, by one and the same continued act, carried off by the person who severed them, they never could be said to be taken from the proprietor, in this their newly acquired state of mobility (which is essential to the nature of larceny), being never, as such, in the actual or constructive possession of any one, but of him who committed the trespass. He could not, in strictness, be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at one time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid; and come again at another time, when they are so turned into personalty, and take them away, it is larceny; and so it is if the owner, or anyone else, has severed them. Stealing ore out of

mines is also no larceny, upon the same principle of adherence to the freehold.

Writings and securities. Upon nearly the same principle the stealing of writings relating to a real estate is no felony; but a trespass: because they concern the land, or (according to our technical language) savour of the realty, and are considered as part of it by the law: so that they descend to the heir, together with the land which they concern. Bonds, bills, and notes, which concern mere choses in action, were also, at the common law, held not to be such goods whereof larceny might be committed; being of no intrinsic value, and not importing any property in possession of the person from whom they are taken. But by the statute 2 Geo. II, c. 25, they are now put upon the same footing, with respect to larcenies, as the money they were meant to secure.

Intrinsic value of animals. Larceny also cannot be committed of animals in which there is no property either absolute or qualified: as of beasts that are *ferœ naturœ* (of a wild nature) and unreclaimed, such as deer, hares, and conies in a forest, chase, or warren; fish in an open river or pond, or wild fowls at their natural liberty. But if they are reclaimed or confined, and may serve for food, it is otherwise, even at common law: for of deer so inclosed in a park that they may be taken at pleasure, fish in a tank and pheasants or partridges in a mew, larceny may be committed.

But of all valuable domestic animals, as horses and other beasts of draught, and of animals *domitœ naturœ* (of a tame nature), which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool, larceny may be committed; and also of the flesh of such as are either *domitœ* or *ferœ naturœ* (of a wild nature), when killed. As to those animals which do not serve for food, and which, therefore, the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny.

12. Capital punishment.—[The stealing of goods above the value of 12 pence was, for many centuries, a felony punishable

with death, and this is one of the causes of the great technicality of the criminal law.]

Blackstone, writing in 1765, says that: Though the inferior species of theft, or petit larceny, is only punished by imprisonment or whipping at common law, yet the punishment of grand larceny, or the stealing above the value of twelvepence (which sum was the standard in the time of King Athelstan, eight hundred years ago) is regularly death. Which, considering the great intermediate alteration in the price or denomination of money is undoubtedly a very rigorous constitution; and made Sir Henry Spelman (above a century since, when money was at twice its present rate), complain that while every thing else was risen in its nominal value, and become dearer, the life of man had continually grown cheaper.

It is true, that the mercy of juries will often make them strain a point, and bring in larceny to be under the value of twelvepence, when it is really of much greater value, but this, though evidently justifiable and proper when it only reduces the present nominal value of money to the ancient standard, is otherwise a kind of pious perjury, and does not at all excuse our common law in this respect from the imputation of severity, but rather strongly confesses the charge.

It is likewise true, that by the merciful extensions of the benefit of clergy by our modern statute law, a person who commits a simple larceny to the value of thirteen pence, or thirteen hundred pounds, though guilty of a capital offence, shall be excused the pains of death; but this is only for the first offence. And in many cases of simple larceny the benefit of clergy is taken away by statute; as for horse-stealing in the principals, and accessories both before and after the fact.

13. **Compound larceny.**—Mixed or compound larceny is such as has all the properties of the former, but is accompanied with either one or both of the aggravations of a taking from one's house or person.

First, therefore, of larceny from the house, and then of larceny from the person.

Larceny from the house, though it seems (from the considerations mentioned in the preceding chapter) to have a higher degree of guilt than simple larceny, yet it is not at all distinguished from the other at common law; unless where it is

accompanied with the circumstance of breaking the house by night, and then we have seen that it falls under another description, viz.: that of burglary.

Robbery. Larceny from the person is either by privately stealing; or by open and violent assault, which is usually called robbery.

The offence of privately stealing from a man's person, as by picking his pocket or the like, privily without his knowledge, was debarred of the benefit of clergy, so early as by the statute 8 Eliz. c. 4. But then it must be such a larceny as stands in need of the benefits of clergy, viz., of above the value of twelvepence; else the offender shall not have judgment of death. For the statute creates no new offence; but only prevents the prisoner from praying the benefit of clergy, and leaves him to the regular judgment of the ancient law. This severity (for a most severe law it certainly is) seems to be owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with which they were practiced.

Open and violent larceny from the person, or robbery, the *rapina* of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him to fear. There must be a taking, otherwise it is no robbery. A mere attempt to rob was indeed held to be felony, so late as Henry the Fourth's time, but afterwards it was taken to be only a misdemeanor, and punishable with fine and imprisonment; till the statute 7 Geo. II, c. 21, which makes it a felony (transportable for seven years) unlawfully and maliciously to assault another with any offensive weapon or instrument; or by menaces, or by other forcible or violent manner, to demand any money or goods; with a felonious intent to rob.

If the thief, having once taken a purse, returns it, still it is a robbery; and so it is whether the taking be strictly from the person of another, or in his presence only; as, where a robber by menaces and violence puts a man in fear, and drives away his sheep or his cattle before his face. But if the taking be not either directly from his person, or in his presence, it is no robbery. It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery.

14. Embezzlement.—[The scope of larceny at common law was far too narrow to furnish adequate protection to personal property. The old common law doctrine that a person who stole property intrusted to him was liable to no punishment was ridiculed by Swift in Gulliver's Travels, where the fact was pointed out that a breach of trust, or the fraudulent dealing with property innocently received deserves punishment as much as a felonious taking. "The English law of criminal misappropriation has been extended piecemeal by fictions and by special legislation confined to particular instances; and the resulting mass is at once heterogeneous and incomplete." Kenny, Outlines Crim. Law, p. 238.]

[The crime of embezzlement is a statutory extension of the crime of larceny to cover cases where there is a deprivation of personal property by dishonest conversion, but no fraudulent trespass or taking. It consists in fraudulent conversion by a bailee, the misappropriation of property by a person to whom it has been intrusted; not in a distinct act of taking from the possession of another without his consent as in larceny. Claim of title made in good faith, even though untenable, negatives this offence, as there must be *animus furandi.* Unlawful retention of the property of another to offset or pay demands held against him is, however, not justified or excused, and constitutes embezzlement.]

15. Obtaining property by false pretences.—[Where a swindler obtains the ownership of goods by fraudulently inducing the owner to part with his title to them, we have the statutory offence of obtaining property by false pretences. This is, in effect, the criminal aspect of the tort of deceit. Where the owner was induced to give up the possession merely but not the ownership of his goods this was the crime of larceny by trick, as where one gets permission to try another's horse and rides off with it.]

[False pretences may be regarded as an offence not against property, but against the "right of self-protective choice." The loss of property is merely the particular damage that characterizes criminal deceit. Accordingly the rules relating to the tort of deceit apply in general to false pretences. Representations as to future events are treated here also as matters of conjecture upon which every person must exercise his own

judgment unless indeed as in tort some representation as to the present be implied. Drawing a check for instance implies certain representations of present facts, although it is on its face only an order for a future act; it implies that the drawer has account with that bank, and that he has authority to draw on it for that amount, and that in the ordinary course of events the check will be duly honored. Kenny, Outlines Crim. Law, p. 246.]

16. **Extortion.**—[Extortion is similar to false pretences in that it is the obtaining of the transfer of property from another by duress, by a consent obtained by the wrongful use of force, or fear, or under color of official right. At common law the obtaining of money and property by force, fear and duress was not extortion, except in the case of a public officer acting under color of his office. A taking of the possession merely, by force, where there is no passing of title is, of course, robbery. Statutes extend the crime of extortion to cover the obtaining of property by threats, blackmail, or threatening letters to compel a transfer of property against one's will.]

17. **Forgery.**—[Forgery is the offence, at common law, of "the fraudulent making or alteration of a writing to the prejudice of another man's right." This crime is the offence of making preparation to obtain property by the false pretence of a false document. If the attempt is carried out, the crime of false pretences, also, is perpetrated; but the mere making of a false document (like counterfeiting coin) with the intent to deceive and defraud another is forgery, without the actual uttering or attempting to pass it off, or the actual obtaining of property by the forged or altered instrument.]

18. **Forcible entry and detainer.**—An offence against the peaceful possession of real property is that of a forcible entry and detainer; which is committed by violently taking or keeping possession of lands and tenements, with menaces, force and arms, and without the authority of law. This was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances. But this being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods, even of doing themselves justice; and much more if they have

no justice in their claim. So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence, and unusual weapons.

19. Malicious mischief.—[Mischievous damage to real or personal property, is another species of injury to private right which by statute is made a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss; but either out of a spirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arson, which was the only form of injury to real property recognized by the common law as a crime. There are now statutes which make a variety of malicious and mischievous trespasses, such as cutting and carrying away trees or things attached to the soil, punishable as misdemeanors.]

CHAPTER XV.

OFFENCES OF A PUBLIC OR A GENERAL NATURE.

1. **Classes of public offences.**—[Passing from offences against the person or property rights of individuals, we come to crimes such as more especially affect public or general interests. These include (1) political offences, the revolt of members of the state against the duly constituted authority or government which they are bound to defend and support; (2) interferences with the due exercise of the functions of government, legislative, executive, or judicial, as by bribery and corruption; (3) offences against the public peace and order, safety, health, good morals, and the social and economic well-being of the people at large.]

2. **Treason.**—[The political importance of treason would make it interesting to follow the history of this offence which is connected with the most stirring periods of English history, yet we can only indicate its general nature. At the ancient common law, the definition of treason was vague, and it was possible for subservient judges to construe all political opposition, discussion, or agitation as treason against the government. Treason, however, attained a statutory definition in 1352 (25 Edward III, c. 2), earlier than any other criminal offence; and from this statute we derive the phrases employed in the American law of treason.]

American Law. [Treason against the United States is very carefully defined and limited by the Constitution, and it can consist only "in levying war against them," or in "adhering to their enemies, giving them aid and comfort." Const. of United States, Art. III, § 3. And by the same section, "No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." See, also, act of April 30, 1790, 1 Stat. at Large, 112, prescribing the penalty of death for this offence. Treason may also be committed against the several states. The crime is generally defined and limited in the state constitutions in the same manner as in

the Constitution of the United States, and the punishment prescribed is the same.]

3. **Change in conception of treason.**—[The old feudal conceptions of treason have been transformed. It is no longer a class of offences, nor does it include personal injuries to the chief executive, his family, or other public officers. Treason, in American Law, is essentially a breach of the obligation of allegiance, which binds every citizen to defend the national independence, territory, honor, and interests of his country, to serve in the army or national guard when required against foreign enemies, and to uphold the established government. The distinction between the king or supreme ruler and the State is unknown to English law, and allegiance there is the feudal bond of personal loyalty to the prince.]

4. **Two branches of treason.**—[Treason consists in two very different species of disloyalty, described by phrases long in use, and to which an artificial meaning has been attached by strained constructions, instead of being expressed in plain words: (1) Treason "by adhering to foreign enemies, giving them aid and comfort," covers offences against the external safety of the state, by the treachery and disloyalty of its citizens. In our law, the country or state is the object of this crime and not the president or king. "Adhering to foreign enemies" is a vague expression which includes assisting in an armed attack on one's country by foreign enemies, giving them information, as a spy, in time of war, furnishing them provisions and arms, treacherously surrendering forts, ships, or places to them; desertion to, and joining with, them in warlike attack, instigating foreigners to invade, or intriguing to facilitate their hostile entrance. Treason can only be committed by citizens and persons owing permanent or temporary allegiance by reason either of birth or residence.]

[*Treason by levying war* is extended to include insurrections, and forcible attempts to overthrow the established government. This is legally the most important species of treason, and its careful definition is necessary as a protection to the freedom of political agitation and discussion. It has been extended in England so far as to include great riots to further any political object. In case of rebellion, the rebels are technically traitors against the government, and if captured or defeated, the pris-

oners may be executed as such; yet even before the final success of a forcible revolution, the revolutionary side in a great civil war may become strong enough to compel the established government to treat its adherents as enemies entitled to quarter, and not as traitors. The paradoxical effect of the final success of rebellion and forcible revolution is to turn traitors into heroes, and to mark a new departure in the political institutions of the country, as when the independence of the United States was achieved in the American War of Revolution. II Stephen, Hist. Crim. Law, pp. 221-283. If the British power had been re-established over the colonies every one who took part in the war, or adhered to those who did so, would have been technically a traitor, and liable to be executed as such. But war must be met extra-judicially, with armed force and not by judicial punishment; when a rebellion has suffered defeat in the field, subsequent punishment seems cruel, and is not practiced by modern civilized nations, though wholesale executions took place under the notorious Judge Jeffreys after the rising of Monmouth against James II.]

5. **Possible conflict between law and justice.**—[In political offences, a distressing conflict may occur between law and justice. No government can exist which does not protect itself from attacks on its authority. II Stephen, Hist. Crim. Law, p. 85. The duly constituted authority must therefore vindicate its power in order to be respected, even at the expense of the lives of its enemies, and the law must treat rebellions as wicked and malicious in all cases. Questions of sovereignty can be determined only by force, and even those who assert the fundamental natural right of the people to change their institutions, if they become intolerably bad, may be executed as traitors by the law, though they fall as "devoted patriots and glorious martyrs to the divine cause of liberty." Such is the possible conflict between freedom and authority, which can only be reconciled when liberty and authority are combined, and when government is established upon the sovereignty of the people and the rights of man, instead of resting upon an arbitrary and military basis.]

6. **Offences against the public peace.**—[We shall pass over the offences which consist of abuses and obstructions of public authority, such, for instance, as offences against public justice by perjury, subornation of perjury (the offence of procuring

one to swear falsely); bribery, the taking or offering a reward to influence an official's action in office; embracery, or the tampering with juries; compounding felonies; contempt of court; falsifying records; and proceed to offences against the public peace.]

The king's peace. [This was the name applied to the protection given by the king, which came to be extended over all persons and places against forcible acts of violence. Every crime is to a greater or lesser extent a breach of the peace; that is, a disturbance of that security, tranquillity, and quiet in which the various pursuits of life should be carried on, free from interruption by violence and frauds, a condition which it is the first object of all government to maintain. Some offences tend merely to break the peace against some particular person, whereas others interfere with it on a wider scale, by acts which affect the tranquillity of a considerable number of persons or an extensive local area. II Stephen, Hist. Crim. Law, p. 241.]

7. Riots—Routs—Unlawful assemblies.—These are direct breaches of the general public peace. Unlawful assemblies are where three or more persons assemble themselves together in *terrorem populi,* for the commission of some crime or in such a way as to create alarm and reasonable fear of a breach of the peace. An unlawful assembly develops into a rout so soon as it makes any advances toward carrying out its illegal purpose. The rout will become a riot as soon as three or more actually do an unlawful act of violence; as if they beat a man; or even if they do lawful acts in a violent and tumultuous manner. All these three offences are misdemeanors.

[It is said by Stephen that riots differ only in degree from civil war and rebellion, but a clear distinction exists between insurrections and rebellions, which are risings of a political nature, to subvert the authority of government; and riots disturbing the public tranquillity by attacks on other citizens, where there is no dispute of constitutional authority. Even a riot of great proportions, where the mob attempts to burn down an entire city, is not a political demonstration, and though the military be called out to suppress it, is a very different thing from treason by levying war.]

8. Felonious rioting—Reading the riot act.—The statute 1 Geo. I, stat. 2, c. 5, enacts, generally, that if any twelve per-

sons are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town, shall think proper to command them, by proclamation, to disperse, if they contemn his orders and continue together for one hour afterwards, such contempt shall be felony, without benefit of clergy. And, farther, if the reading of the proclamation be by force opposed, or the reader be in any manner willfully hindered from the reading of it, such opposers and hinderers are felons, without benefit of clergy: and all persons to whom such proclamation ought to have been made, and knowing of such hinderance, and not dispersing, are felons, without benefit of clergy. There is an indemnifying clause, in case any of the mob be unfortunately killed in the endeavor to disperse them: this being copied from the act of Queen Mary.

[Every citizen, however, as well as peace officers and the militia, has, by common law, the right and duty of using even deadly violence, whenever it is indispensable for the purpose of protecting person and property against a felonious mob of rioters, without any proclamation.]

9. **Affrays.**—(From *affraier*, to terrify.) Are the fighting of two or more persons in some public place, to the terror of his majesty's subjects; for, if the fighting be in private, it is no affray, but an assault. Affrays may be suppressed by any private person present, who is justifiable in endeavoring to part the combatants, whatever consequence may ensue. But more especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace.

10. **Criminal libels.**—These are malicious defamations of any person, made public by either printing, writing, signs or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law: and therefore the sending an abusive private letter to a man is

as much a libel as if it were openly printed, for it equally tends to a breach of the peace. For the same reason it is immaterial with respect to the essence of a libel, whether the matter of it be true or false; since the provocation, and not the falsity, is the thing to be punished criminally: though doubtless, the falsehood of it may aggravate its guilt and enhance its punishment.

In a civil action, we may remember, a libel must appear to be false, as well as scandalous; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace; and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the whole that the laws considers. And, therefore, in such prosecutions, the only points to be inquired into are, first, the making or publishing of the book or writing: and, secondly, whether the matter be criminal: and, if both these points are against the defendant, the offence against the public is complete. The punishment of such libellers, for either making, repeating, printing, or publishing the libel, is fine, and such corporal punishment as the court in its discretion shall inflict: regarding the quantity of the offence, and the quality of the offender.

11. Public nuisances.—Public or common nuisances are a species of offence, similar in nature to the private sort, which consist in doing a thing to the annoyance of a whole community or to an indefinite number of persons, and not merely to some particular land owner; as where the public are obstructed in the enjoyment of highways, bridges, and public rivers. All those offensive trades and manufactures, which, when injurious to a private land owner are actionable, are, when detrimental to the public, punishable by public prosecution. Anything injurious to health, or offensive to the senses, so as to essentially interfere with the comfortable enjoyment of life or property by an entire neighborhood or a considerable number of persons, even when resulting from the exercise of private rights, comes within these limitations upon conduct on behalf of the general welfare. Public prosecution is a mere substitute for civil action for such public torts.

Two curious instances of common law nuisances are as follows: *Eaves-droppers,* or such as listen under walls or windows or the eaves of a house to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance.

A common scold, communis rixatrix (for our law-Latin confines it to the feminine gender), is a public nuisance to her neighborhood. For which offence she may be indicted: and if convicted, shall be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or cucking stool, which, in the Saxon language, is said to signify the scolding stool; though now it is frequently corrupted into ducking stool, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment.

12. Police regulations.—[Beyond the self-evident limitation on the exercise of private rights and pursuits which existed at common law under the head of public nuisances, there is a great volume of statutes accumulating yearly, for the due regulation of the domestic order of the state; whereby individual citizens of the state, like members of a well governed family, are bound to conform their general behavior to conventional rules of propriety, good neighborhood, public economy, and social coöperation; and to be decent, industrious and inoffensive in their respective stations. These are of infinite variety and need not be referred to further. Though they are classed as crimes, they differ in nature from injurious offences and do not even involve so much culpability as ordinary torts. Indeed, criminal intent is frequently not required, as for example in the violation of statutes concerning sale of adulterated articles, diseased meat, and certain dealings with drunkards or minors.]

13. Attempts and inchoate offences.—[At common law every attempt to commit any criminal offence, whether the ulterior offence be felony or misdemeanor, is itself a misdemeanor. By various statutes particular attempts have been made felonies, such as attempts to commit murder.]

[Apart from any doctrine as to attempts, many offences are not directly injurious, but only so in their tendency; they are in the nature of attempts to commit some further injury or wrong, as forgery is the mere preparation to defraud or obtain property by false pretences. So treason is essentially an attempt to

subvert the established government. If it fully succeeds it ceases to be treason and becomes a successful revolution or new departure in the political history of the country. II Stephen, Hist. Crim. Law, p. 221.]

[The law as to what amounts to an attempt is necessarily vague. In general the act must be closely connected with the actual execution of the offence, a mere preparation which does not approach to a carrying out of the design, is insufficient. The act must come sufficiently proximate or close to be necessarily referable to the crime, though in serious crimes the act may be more remote than in minor offences. There has been some doubt whether if success were physically impossible, as in the case of a man attempting to pick an empty pocket, or shooting at a log intending to kill a man, the effort would amount to a criminal attempt. The better view would seem to be that such acts, if apparently possible, are dangerous and punishable.]

Criminal conspiracy. [The mere agreement of two or more persons to commit a crime or to carry out any unlawful or immoral plan which is injurious to the public, as a conspiracy in unlawful restraint of trade or competition, is itself a criminal offence. Conspiracy to carry on malicious prosecution was formerly punishable by an extremely severe punishment called the "villain" judgment. II Stephen, Hist. Crim. Law, p. 227.]

Incitement. [A person who counsels, procures, or commands another to commit either a felony or misdemeanor is guilty of the misdemeanor of incitement. If the offence be committed he becomes still more guilty, as accessory before the fact to felony, or as a principal offender in treason or misdemeanor. II Stephen, Hist. Crim. Law, p. 230.]

14. Extra-territorial offences—Piracy.—[A state ordinarily extends the protection of criminal sanctions only against offences committed within its own territory. A wrongdoer coming into its borders from abroad will not be punished, since the foreign country alone has jurisdiction to punish the crime. But the criminal jurisdiction of a country extends over all vessels registered in its ports and flying its flag, even if lying in the port of another country.]

[On the high seas, also, where there is no sovereignty or government, violent acts which threaten the safety of vessels of all nations, such as mutiny or seizure of a ship, armed violence,

warlike capture, make it necessary for a nation to protect itself and its citizens against force and violence abroad as well as at home.]

Piracy. The crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis* (an enemy to mankind). As, therefore, he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him; so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.

Piracy generic term. [The offence of piracy, by common law, is not susceptible of any precise definition, but consists in committing those acts of robbery and depredation upon the high seas, which require punishment even though extra-territorial. In addition to mutiny, and warlike capture of ships, many other offences have been made piracy by statute. Thus any commander betraying his trust, and running away with any ship or cargo; or yielding them up voluntarily to a pirate; or any person confining the master of a vessel or endeavoring to make a revolt on board, were by English statutes to be adjudged pirates and to suffer death.]

CHAPTER XVI.

ACCOUNTABILITY FOR CRIMINAL OFFENCES.

1. **Union of act and intent.**—[Having in the preceding sections, considered in general the various criminal offences, we are led next to inquire into the second great branch of criminal law, namely, that relating to criminal responsibility and the general conditions of guilt in the offender. To make a complete crime, or offence punishable by law, there must be both act and also guilt, *mens rea,* or an accountable mind, in the offender. An overt act is the first essential; although *in foro conscientiæ* (in the tribunal of conscience) moral guilt alone, a fixed design or will to commit a criminal offence, is almost as heinous as the commission of it, yet, as no human tribunal can search the heart or fathom the intentions of the mind, otherwise than they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason, among others, some definite overt act, that is, some movement of the body with external consequences, capable of being distinctly proved, is necessary to constitute a criminal offence making a man liable to punishment.

From offence to offender. The primary basis of inquiry by criminal justice is, then, the commission of some act, some criminal offence, the *corpus delicti.* Criminal law regards mainly the consequences resulting from such an offence as injurious to the community, and endeavors to prevent such offences from recurring by a suffering imposed upon the offender. The second stage of the inquiry is therefore to fasten the act upon the offender and trace the injurious event back to the guilty mind responsible for it.]

2. **Criminal intent, general and specific.**—As a mere criminal intent without a criminal act is no crime, so, on the other hand, the mere committing of the punishable act is no crime without the accountable mind, called *mens rea* or criminal intent. *Actus non facit reum nisi mens sit rea.* ["The idea of moral wickedness

is interwoven with that of legal crime." This does not mean that there cannot be such a thing as legal guilt where there is no moral guilt. Neither does it indicate that there is some particular vicious state of mind called a "mens rea," the absence of which, on any particular occasion, deprives what would be otherwise a crime, of its criminal character. The general rule, as in tort, is that men are responsible for their voluntary actions unless they come within certain exceptions of justification or excuse. An involuntary or an accidental wrong (if non-negligent) does not in general induce guilt: the concurrence of the will, when it has its choice either to do or avoid the offence in question, being the only thing that renders a man accountable to punishment or to action for redress, excepting in cases of absolute liability.]

Specific intent, the mental element in offences. [The *corpus delicti* or criminal offence frequently includes a mental as well as a physical element, which may be described as the "specific intent." The act is punishable, or more severely punishable, by reason of the specific intent with which it is done; the spirit, motive or design of the offender. Such are the *animus furandi* or intent to deprive the owner of his property permanently, fraudulently and without claim of right, which is an essential element of larceny and embezzlement; the various sorts of culpability that come within the "malice aforethought" of murder; the "malicious wilfullness" in arson and malicious mischief; the intent to defraud in forgery. The specific intent is specified in the definition of the particular offence and is a part of it; if not present, that particular offence has not been committed. General intent, on the other hand, is that condition of mind and will (not necessarily of intentional wrongdoing) which makes the offender liable to punishment for offences in general; it relates to the general mental conditions of criminal responsibility. Specific intent, if required, may necessarily include *mens rea* or the general conditions of accountability. *Mens rea* may, however, exist even in the case of accidental offences.]

3. **Absolute liability.**—[There may be criminal intent and offenders may be accountable for offences, even when the result of their acts is purely accidental and the offender never intended to commit the criminal offence in which his act results. Law in its earliest days tries to make men answer for all the ills of

an obvious kind that their deeds bring upon their fellows, no matter what their intentions or motives. This rigid principle, which charges a man with all the evil he has done, is gradually mitigated to hold him only for harm which he has intended or which is caused by his negligence or unlawful conduct. II Pollock & Maitland, History Eng. Law, 470, 471.]

Of accident as an excuse for killing we shall find more occasion to speak soon; at present only observing, that if any accidental mischief happens to follow from the performance of a lawful act, the party stands excused from all guilt; but if a man be doing any thing unlawfully, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehavior.

[The establishment of a reasonable standard of responsibility is a task upon which the law is still at work. A mean must be found between these two extremes—absolute liability for all harm done and liability only for harm that is both done and intended. Our law started not with the maxim *actus non facit reum nisi mens sit rea* but from the other extreme: *Factum reputabitur pro voluntate.* We still hang as guilty of "wilful murder by malice aforethought" the man who killed when he meant only to inflict some grievous bodily harm, or commit an entirely different felony or even misdemeanor. Any such idea as negligence is approached not as a basis of liability but as negativing a possible excuse on the ground of accident or innocent misadventure.] II Pollock & Maitland, Hist. Eng. Law, p. 475.

4. Principles of liability illustrated by homicide.—[Since there is no common law felony except manslaughter without some element of specific intent and almost necessarily actual intent, these general principles of criminal liability are best exemplified in connection with responsibility for homicide. Every homicide that is neither justifiable nor yet excusable as the result of misadventure or self-defence, was in Bracton's age felonious. Blackstone points out that even in case of misadventure, the law presumes negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it.

He therefore is excusable though not altogether faultless; and even in the case of self-defence the law intends some misbehavior in the person who takes life, and distinguishes such excusable killing from the justifiable killing of a malefactor by the command or express permission of the law. We shall now examine various matters of justification and excuse, which illustrate the principles of criminal responsibility, more particularly in relation to homicide.]

5. Justification by judicial and executive authority.— Justifiable homicide is of divers kind, being such as is done by express authority or permission of law without any criminal will, intention, or desire, and without any inadvertence or negligence in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who has forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must require it, otherwise it is not justifiable: therefore, wantonly to kill the greatest of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled, and extra-judicially, is murder, although the sufferer deserved death. And farther, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder. And upon this account, Sir Matthew Hale himself, though he accepted the place of a judge of the common pleas under Cromwell's government, since it is necessary to decide the disputes of civil property in the worst of times, yet declined to sit on the crown side at the assizes, and try prisoners; having very strong objections to the legality of the usurper's commission; a distinction perhaps rather too refined; since the punishment of crime is at least as necessary to society as maintaining the boundaries of property. Judgment of death, when legal, must be executed by the proper officer, or his appointed deputy; for no one else is required by law to do it, which requisition it is that justifies the homicide. If another person doth it of his own head, it is held to be murder: even though it be the judge himself.

It must farther be executed *servato juris ordine,* "accord-

ing to the order of the court," it must pursue the sentence of the court.

If an officer beheads one who is adjudged to be hanged, or vice versa, it is murder: for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law.

6. Justification by prevention of crime.—Again, in some cases homicide is justifiable, rather by the permission, than by the absolute command, of the law, either for the advancement of public justice, which without such indemnification would never be carried on with proper vigor; or, in such instances where it is committed for the prevention of some atrocious crime, which otherwise cannot be avoided.

Homicides committed for the advancement of public justice are: (1) Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him. (2) If an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavor to take him, kills him. (3) In case of a riot, or rebellious assembly, the officers endeavoring to disperse the mob are justifiable in killing them, both at common law, and by the riot act. But in all these cases, there must be an apparent necessity on the officer's side, viz.: that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable.

Champions. If the champions in a trial by battle killed either of them the other, such homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favor of the truth.

Killing to prevent dangerous felony. In the next place, such homicide as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of Bracton. If any person attempts a robbery or murder of another, or attempts to break open a house in the night-time (which extends also to an attempt to burn it), and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied by force, as picking of pockets; or to the breaking open of any house in the daytime,

unless it carries with it an attempt of robbery also. So the Jewish law, which punished no theft with death, makes homicide only justifiable in case of nocturnal housebreaking; if a thief be found breaking in, and he be "smitten that he die, there shall no blood be shed for him: but if the sun be risen upon him, there shall blood be shed for him; for he should make full restitution." At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact: and by the Roman law of the twelve tables, a thief might be slain by night with impunity: or even by day, if he armed himself with any dangerous weapon: which amounts very nearly to the same as is permitted by our constitutions.

Defence of chastity. The Roman law also justifies homicide, when committed in defence of the chastity either of one's self or relations: and so also, according to Selden, stood the law in the Jewish republic. The English law likewise justifies a woman killing one who attempts to ravish her: and so, too, the husband or father may justify killing a man who attempts a rape upon his wife or daughter: but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. And I make no doubt but the forcibly attempting a crime of a still more detestable nature may be equally resisted by the death of the unnatural aggressor. Yet the law of England, like that of every other well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to suffer with impunity crime in general to be prevented by death, unless the same, if committed, would also be dangerous to life itself.

7. **Excusable homicide—Accident.**—In the instances of justifiable homicide, it may be observed, that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in excusable homicide, the very name whereof imports some fault, some error, or omission; so trivial, however, that the law excuses it from the guilt of felony, though, in strictness, it judges it deserving of some little degree of punishment.

Accident from lawful act. Excusable homicide is of two sorts; either *per infortunium,* by misadventure; or *se defendendo,* upon a principle of self-preservation. We will first see wherein these

two species of homicide are distinct, and then wherein they agree.

Homicide per infortunium or misadventure is where a man, doing a lawful act, without any intention of hurt or culpable negligence, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by: or where a person, qualified to keep a gun, is shooting at a mark, and undesignedly kills a man: for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; for the act of correction is lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder: for the act of immoderate correction is unlawful. (Rex v. Oxley, 23 Can. Crim. Cas. 262.)

8. **Self-defence.**—Homicide in self-defence, or *se defendendo,* upon a sudden affray, is also excusable, rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuse, but of justification. But the self-defence which we are now speaking of is that whereby a man may protect himself from an assault, or the like, in the course of a sudden broil or quarrel, by killing him who assaults him.

Apparent necessity must exist. This right of natural defence does not imply a right of attacking; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot, therefore, legally exercise this right of preventing defence, but in sudden and violent cases where apparently certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.

Doctrine of retreat to the wall. It is frequently difficult to distinguish this species of homicide (upon chance-medley in self-defence) from that of manslaughter, in the proper legal sense

of the word. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun the fight, or having begun, endeavors to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. For which reason the law requires that the person who kills another, in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not factitiously, or in order to watch his opportunity, but for a real tenderness of shedding his brother's blood. And though it may be cowardice in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects the law countenances no such point of honor; because courts are the *vindices injuriarum* (avengers of injuries), and will give to the party wronged all the satisfaction he deserves. The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm: and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice, as well as of the municipal law.

Self-imposed necessity. If the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Neither, under the color of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, this is murder; because of the previous malice and concerted design. But if A upon a sudden quarrel assaults B first, and upon B's returning the assault A really and bona fide flees; and, being driven to the wall, turns again upon B and kills him; this may be *se defendendo* according to some of our writers; though others have thought this opinion too favorable: inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. Under this excuse of self-defence, the principal civil and

natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself.

9. Necessity as an excuse for killing.—There is one species of homicide, *se defendendo,* where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by Lord Bacon, where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's is excusable through unavoidable necessity, and the principle of self-defence: since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of each other's life.

Necessity as excuse for stealing. There is yet another case of necessity, which has occasioned great speculation among the writers upon general law, viz., whether a man in extreme want of food or clothing may justify stealing to relieve his present necessities. And this both Grotius and Puffendorf, together with many other of the foreign jurists, hold in the affirmative; maintaining by many ingenious, humane, and plausible reasons, that in such cases the community of goods, by a kind of tacit confession of society, is revived. And some even of our own lawyers have held the same, though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquated, the law of England admitting no such excuse at present. And this its doctrine is agreeable not only to the sentiments of many of the wisest ancients, particularly Cicero, who holds that "*suum cuique incommodum ferendum est, potius quam de alterius commodis detrahendum*" (every one must bear his own inconvenience, rather than detract from the convenience of another); but also to the Jewish law, as certified by King Solomon himself: "If a thief steals to satisfy his soul when he is hungry, he shall restore sevenfold, he shall give all the sub-

stance of his house:" which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason: for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no man can possibly be an adequate judge, but the party himself who pleads them. Where charity is reduced to a system, and interwoven in our very constitution, our laws ought by no means to be taxed with being unmerciful for denying this privilege to the necessitous.

10. Compulsion.—[The mere command of a superior to his subordinate will not of itself excuse the commission of any crime, as the illegal order of a military officer to a soldier under him, that of a master to a servant or of a parent to a child. Yet a soldier may be justified in relying upon his officer's superior knowledge of the circumstances, and he may often be excused upon the ground of innocent mistake where the officer would be criminally responsible for murder for an illegal command to fire upon a mob. L. R. A., 1915 A, 1141 note.]

[*Duress,* or coercion by the reasonable apprehension of immediate death or great bodily harm, will relieve one from liability for some crimes as where a mother terrorizes her child and uses him as an agent of harm. Hypnotism would no doubt be recognized as an excuse for murder. If a person be under actual force and constraint in time of war or rebellion, this will even excuse treason, by joining with the rebels or enemies, provided he leaves them whenever he has a safe opportunity.]

[The principal case where the constraint of a superior was recognized as an excuse for criminal offences at common law, is in regard to the matrimonial subjection of a wife to her husband. The actual constraint of his will relieves the wife from accountability for felony, such as theft or burglary committed in his presence, but not for treason or murder. Whatever the wife does in the presence of the husband is prima facie presumed to be compelled by him, though this presumption may be rebutted by evidence.]

[This artificial and technical presumption of conjugal subjection was probably invented because women did not enjoy the privilege of benefit of clergy by which any man able to read could escape punishment for the first offence, except in crimes of such extreme gravity as murder and treason, where the priv-

ilege was removed by statute. See Kenny, Outlines of Criminal Law.

Not even an actual command, however, will excuse the wife unless she commits the offence in her husband's presence, actual or constructive, *i. e.*, near enough to be under his immediate influence and control.]

11. Mistake of fact.—[Knowledge that what the offender is doing is wrong is an essential element of mens rea or criminal responsibility. In the case of civil liability the mistake of the defendant does not defeat the plaintiff's claim for redress. But the purpose of criminal is different from civil responsibility and punishment may not justly be imposed upon an innocent man. As if a man, intending to kill a burglar in his own house, by mistake kills one of his own family, this is not criminal. Such ignorance or mistake as to the circumstances as shows entire innocence of intent to commit any act that is wrong or contrary to law, eliminates a main ingredient of mens rea and makes punishment useless cruelty. "I didn't know it was loaded," may, however, be too unreasonable a mistake to extenuate culpability.]

[There are certain statutory offences, such as selling an adulterated article of food; selling liquor to a drunken person; where a guilty knowledge or belief as to the circumstances, that the goods was adulterated or that the purchaser was drunk, is not an element of responsibility. In such cases the offender must take the risk of the act turning out to be criminal and employ sufficient precautions at his peril.]

Mistake of law. [The mistake which negatives guilt of crime must be a mistake of fact and not an error in point of law; as if a man thinks he has a right to kill another man who has betrayed his wife, wherever he meets him, and does so; this is willful murder. Ignorance or mistake of law is no excuse for breaking it. If a man supposes that his act is justifiable according to current morality, and it is in fact punishable, he may nevertheless be held criminally responsible. Still it is doubtful whether there is sufficient basis for so stringent and severe a rule in certain cases where the mistake may be honest and reasonable. It has been said that this rule is to be regarded "not as a realization of ideal justice but as the exercise of society's right of self-preservation."]

12. Infancy.—[Where the offender is incapable of discerning between right and wrong, or intelligently choosing his own conduct, he is beyond the sanctions of the criminal law. He cannot have an accountable mind.] Such is the case of infancy or non-age; where there is such lack of discretion or capacity to discern between good and evil in children as to make them irresponsible. Infants are divided by the law into three classes: (1) Under seven years of age, there is a conclusive presumption that children are not old enough to be accountable, for then criminal discretion is almost an impossibility in nature. (2) Between seven and fourteen, though an infant is prima facie incapable of guile, yet if it appear to the jury that he was capable of the guilty knowledge that he was doing wrong, and could discern between good and evil, he may be convicted and suffer punishment.

But by the law, as it now stands, and has stood at least ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, in this period, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that "*malitia supplet aetatem*" (malice is held equivalent to age). Thus a girl of thirteen has been burnt for killing her mistress: and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. And there was an instance in the last century where a boy of eight years old was tried at Abingdon for firing two barns; and it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. Thus also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behavior plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all

the judges, that he was a proper subject of capital punishment. But in all such cases, the evidence of that malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction.

(3) Above fourteen an infant comes under full criminal responsibility and is equally liable to suffer for his offences as a person of the full age of twenty-one.

13. Insanity.—[Insanity as such is no excuse for crime. An insane man may still be capable of being influenced by ordinary motives, such as fear of punishment. But in cases of such deprivation of the faculties that he is unable to distinguish between right and wrong, he is not chargeable for his acts and an essential element of mens rea is lacking.]

[Every man is presumed to be sane, and to be capable of *mens rea,* until at least a reasonable doubt to the contrary be proved to the jury. If the accused were conscious that the act was one which he ought not to do, he is punishable for the offence. But if he can show that he did not know that what he was doing was wrong, he is beyond the reach of the criminal law. Insane delusion as to the circumstances, as where a man dreaming that he was struggling with a wolf, strangled his wife, is equivalent to a mistake of fact. How far uncontrollable impulse, though one knows the right and wrong of the act, is a sufficient defence, gives rise to a conflict of authority. Irresistible impulse, not produced by a man's own fault, such as kleptomania, may show an entire absence of blame.]

14. Intoxication and drunkenness.—As to artificial, voluntarily contracted madness by drunkenness or intoxication, which depriving men of their reason, puts them under a temporary insanity; our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehavior. For the law, considering how easy it is to counterfeit this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one wrongful act by another. [Yet drunkenness may preclude the existence of some specific intent, such as that of larceny or burglary. Moreover it may induce mistake of fact, and thereby diminish criminal responsibility.]

15. Former jeopardy.—[No man may be brought into jeopardy more than once for the same offence. If an offender has once been put to defend the charge against him, his accounta-

bility is satisfied and discharged and his peace is not to be further harassed. If the offender be once acquitted after trial upon a valid indictment, he cannot be again tried, though his acquittal resulted from error in the trial. The prosecution can never get an error of law corrected, if he be acquitted by the jury on the facts. Jeopardy may occur without either conviction or acquittal. The stopping of the trial needlessly, whether a verdict be reached or not, bars further prosecution. Jeopardy begins when a jury is sworn and charged with the trial of the issue. A disagreement, however, or some other necessity for stopping the trial, as if the prisoner or a juror becomes ill, or where an erroneous conviction is set aside, will constitute no bar. The same act may be punishable both by a State and by the United States in some cases. Where several persons are killed by one shot, or several chattels are stolen at once, or several libelous statements are published in one and the same newspaper: these do not make separate offences, but are regarded as a single set.]

CHAPTER XVII.

PRINCIPALS AND ACCESSORIES.

1. **Principals.**—[It having been shown in the preceding chapter when persons are, or are not, upon account of their situation and circumstances, accountable for committing crimes, we are next to make a few remarks on the different degrees of guilt or complicity among persons that may be concerned in the offending, viz.: as principal and as accessory.]

Degrees. A man may be principal in an offence in two degrees. A principal, in the first degree, is he that is the actor, or absolute perpetrator, of the crime; and, in the second degree, he who is present, aiding and abetting the fact to be done. Which presence need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance. And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon by preparing and laying the poison, or persuading another to drink it who is ignorant of its poisonous quality, or giving it to him for that purpose; and yet not administer it himself, nor be present when the very deed of poisoning is committed. And the same reasoning will hold, with regard to other murders committed in the absence of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed: letting out a wild beast, with an intent to do mischief, or inciting a madman to commit murder, so that death thereupon ensues; in every one of these cases the party offending is guilty of murder as a principal in the first degree. For he cannot be called an accessory; that necessarily presupposing a principal; and the poison, the pitfall, the beast, or the madman, cannot be held principals, being only the innocent instruments of death. As therefore he must be certainly guilty

either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal, and, if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist.

Accessories. An accessory is he who is not the chief actor in the offense, nor present at its performance, but in some way concerned therein, either before or after the fact committed. In considering the nature of which degree of guilt, we will, first, examine what offences admit of accessories, and what not: secondly, who may be an accessory, before the fact: thirdly, who may be an accessory after it.

2. **None in treason or in misdemeanors.**—And, first, as to what offences admit of accessories, and what not. In high treason there are no accessories, but all are principals: the same acts, that make a man accessory in felony, making him a principal in high treason, upon account of the heinousness of the crime. Besides it is to be considered, that the bare intent, with the slightest overt act, to commit treason is many times actual treason: as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without some act and intention to have it done, there can be no accessories before the fact; since the very advice and abetment amount to principal treason. [Neither in misdemeanors or crime under the grade of felony, is it considered worth while to draw distinctions between the various modes of taking part in the commission of them, but only in felonies. There are no accessories to misdemeanors either before or after the fact; but all persons concerned therein, if guilty at all, are principals.]

Reason for distinction between principal and accessory in felonies. Why, then, it may be asked, are such elaborate distinctions made between accessories and principals in felonies? For these reasons: (1) To distinguish the nature and denomination of crimes, that the accused may know how to defend himself, when indicted; the commission of an actual robbery being quite a different accusation from that of harboring the robber. (2) Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes a distinction is made between the punishment of principals and accessories, even before the fact, the latter to be treated with a little less severity than the former, since it pre-

vents the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself. (3) Formerely there were reasons of procedure, *e.g.*, no man could be tried as accessory until after the principal was convicted.

3. **Accessory before the fact.**—As to the second point, who may be an accessory before the fact; Sir Matthew Hale defines him to be one who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory: for if such procurer, or the like, be present, he is guilty of the crime as principal. If A then advises B to kill another, and B does it in the absence of A, now B is principal and A is accessory in the murder. And this holds, even though the party killed be not *in rerum natura* (in the nature of things—born) at the time of the advice given. As if A, the reputed father, advises B, the mother of a bastard child, unborn, to strangle it when born, and she does so; A is accessory to this murder. And it is also settled, that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon the unlawful act; but is not accessory to any act distinct from the other. As if A commands B to beat C, and B beats him so that he dies: B is guilty of murder as principal, and A as accessory. But if A commands B to burn C's house; and he, in so doing, commit a robbery; now A, though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unconsequential nature. But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, and dies: the commander is still accessory to the murder; for the substance of the thing commanded was the death of Titius, and the manner of its execution is a mere collateral circumstance.

4. **Accessory after the fact.**—An accessory after the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. Therefore, to make an accessory *ex post facto* (after the fact), it is in the first place requisite that he knows of the felony committed.

In the next place he must receive, relieve, comfort, or assist him. And generally, any assistance whatever, given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him. So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. But to relieve a felon in gaol with clothes or other necessaries, is no offence; for the crime imputable to accessory after the fact is the hindrance of public justice, by assisting the felon to escape the vengeance of the law. To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law a mere misdemeanor, and made not the receiver accessory to the theft, because he received the goods only, and not the felon: but now by the statutes all such receivers are made felonious offenders.

The felony must be complete at the time of the assistance given; else it makes not the assistant an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent: this does not make him accessory to the homicide; for, till death ensues, there is no felony committed.

But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any of them committed a felony, the receivers become accessories *ex post facto*. But a feme-covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord.

5. Procedure against accomplices.—[The distinction between persons concerned in the commission of an offence (*participes criminis*) or accomplices, whether they directly commit the act or merely aid and abet its commission, though not present, is now of little importance in procedure. The technical

rule of the old common law that the accessories to a crime could not be convicted before their principal was long since abolished. The accessories may be prosecuted, tried and punished, though the principal has not been prosecuted or has been acquitted.

It is still of value to study these gradations of guilt, however, to trace the degrees of participation in crime, whether in treason, felony or misdemeanor, and ascertain where complicity ends and immunity begins.

In criminal law the "principal" is not the employer who authorizes the act, but the agent or servant who carries it out. A logical application of the principle *qui facit per alium facit per se,* would make the accessory-instigator guilty as a principal, whether the active agent through whom he accomplished the crime were innocent or guilty. See Commonwealth vs. Nichols, 43 Am. Dec. 432.]

6. Corporations.—[These may be held accountable for criminal offences; although they are mere associations, having no human body, mind or soul, they are responsible for the wrongs of their agents through whom they act, if authorized. Of course the directors, officers or persons who control and direct the activities of the corporation in violation of law may be indicted individually in their own names and punished in their own persons; yet there can be no effectual means for deterring corporations from an oppressive exercise of power for the purpose of gain, except by indictment against the corporation in its corporate name and by fines inflicted on the corporate property.]

PART IV

LAW OF CONTRACTS AND OBLIGATIONS

CHAPTER XVIII.

SPECIES OF CONTRACTS AND CONTRACT ACTIONS.

1. Debts.—I shall now consider contracts in a comprehensive view, viz., pointing out the general species and remedies or forms of action for each species. Contracts include three distinct species; debts, covenants and simple contracts. Any contract whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of acquisition; being usually divided into debts of record, debts by specialty, and debts by simple contract.

A debt of record is a sum of money, which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law; this is a contract of the highest nature, being established by the sentence of a court of judicature. So that if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of debt upon this judgment, and shall not be put upon the proof of the original cause of action; but upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies, that by the original contract of society the defendant hath contracted a debt, and is bound to pay it. Debts upon recognizance are also a sum of money, recognized or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behavior, or the like; and these, together with statutes merchant and statutes staple, etc., if forfeited by non-performance of the condition, are

also ranked among this first and principal class of debts, viz.: debts of record; since the contract, on which they are founded, is witnessed by the highest kind of evidence, viz., by matter of record.

Debts by specialty, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal. Such as by deed of covenant, by lease reserving rent, or by bond or obligation; which last is a creation or acknowledgment of a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like; on failure of which the bond becomes forfeited and the debt becomes due in law. These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal.

Debts by simple contract are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of more easy proof, and (therefore only) better, than a verbal promise. It is easy to see into what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law.

An obligation or bond, is a deed whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a simple one, *simplex obligato* (a simple obligation): but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force; as payment of rent; performance of covenants in a deed; or repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one-half of the penal sum specified in the bond. In the case this condition is not performed the bond becomes forfeited, or absolute at law, and charges the obligor, while living; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a direct, yet a collateral charge upon

the lands. How it affects the personal property of the obligor will be more properly considered hereafter.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single, and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se,* the obligation itself is void: for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency. On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law; but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought, viz.: his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed; the damages sustained, upon non-performance of covenants; and the like. And the like practice having gained some footing in the courts of law, the statute 4 and 5 Ann., c. 16, at length enacted, in the same spirit of equity, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge.

A recognizance is an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this: that the bond is the creation of a fresh debt or obligation *de novo,* the recognizance is an acknowledgment of a former debt upon record; the form whereof is, "that A. B. doth acknowledge to owe to our lord the king, to the plaintiff, to C D or the like, the sum of ten pounds," with condition to be void on performance of the thing stipulated: in which case the king, the plaintiff, C D, &c., is called the cognizee, "*is cui cognoscitur*" (he to whom it is

acknowledged); as he that enters into the recognizance is called the cognizor, "*is qui cognoscit*" (he who acknowledges). This, being either certified to or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal; so that it is not in strict propriety a deed, though the effects of it are greater than a common obligation, being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrollment on record. There are also other recognizances, of a private kind, in nature or a statute staple, by virtue of the statute 23 Hen. VIII, c. 6, which have already been explained, and shown to be a charge upon real property.

A defeazance on a bond, or recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the same manner as a defeazance of an estate before mentioned. It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed. This, like the condition of a bond, when performed, discharges and disincumbers the estate of the obligor.

2. Covenants or specialty contracts.—A covenant or promise contained in a deed or sealed instrument, to do a direct act or to omit one, is another species of express contracts, the violation or breach of which is a civil injury. As if a man covenants to be at York by such a day, or not to exercise a trade in a particular place, and is not at York at the time appointed, or carries on his trade in the place forbidden, these are direct breaches of his covenant; and may be perhaps greatly to the disadvantage and loss of the covenantee. The remedy for this is by a writ of covenant; which directs the sheriff to command the defendant generally to keep his covenant with the plaintiff (without specifying the nature of the covenant), or show good cause to the contrary; and if he continues refractory, or the covenant is already so broken that it cannot now be specifically performed, then the subsequent proceedings set forth with precision the covenant, the breach and the loss which has happened thereby; whereupon the jury will give damages in proportion to the injury sustained by the plaintiff, and occasioned by such breach of the defendant's contract.

3. Simple contracts.—A simple contract is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If, therefore, it be to do any explicit act, it is an express contract, as much as any covenant; and the breach of it is an equal injury. The remedy, indeed, is not exactly the same: since, instead of an action of covenant, there only lies an *action upon the case,* for what is called the *assumpsit* or undertaking of the defendant; the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. As, if a builder promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, and fails to do it; Caius has an action on the case against the builder, for this breach of his express promise, undertaking, or assumpsit; and shall recover a pecuniary satisfaction for the injury sustained by such delay. So also in the case before-mentioned, of a debt by simple contract if the debtor promises to pay it and does not, this breach of promise entitles the creditor to his action on the case, instead of being driven to an action of debt. Thus likewise a promissory note, or note of hand not under seal, to pay money at a day certain, is an express assumpsit; and the payee at common law, or, by custom and act of parliament, the indorsee, may recover the value of the note in damages, if it remains unpaid.

Statute of frauds. Some agreements, indeed, though never so expressly made, are deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be provided but by the memory (which sometimes will induce the perjury) of witnesses. To prevent which the statute of frauds and perjuries, 29 Car. II, c. 3, enacts, that in the five following cases no verbal promise shall be sufficient to ground an action upon, but at the least some note or memorandum of it shall be made in writing, and signed by the party to be charged therewith: (1) Where an executor or administrator promises to answer damages out of his own estate. (2) Where a man undertakes to answer for the debt, default or miscarriage of another. (3) Where any agreement is made upon consideration of marriage. (4) Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. (5) And lastly, where there is any agreement that is not to be performed within a

year from the making thereof. In all these cases a mere verbal assumpsit is void.

Agreement. [A simple contract may be defined as "an agreement upon sufficient consideration to do or not to do a particular thing." The first element, then, of a simple contract is mutual assent or agreement, which is expressed by offer and acceptance. This agreement may be either express or implied. Express contracts are where the terms of the bargain are openly expressed in words; Implied contracts embrace two species: (1) contracts implied in fact or tacit contracts where an actual agreement is understood or expressed by conduct tacitly; (2) contracts implied in law, or quasi-contracts, which are imposed by the law independent of agreement, where honesty and justice demand payment for benefits received, just as if the defendant had actually promised to pay.]

Consideration. Having thus shown the general nature of a contract, we are, secondly, to proceed to the consideration upon which it is founded; or the reason which moves the contracting party to enter into the contract. "It is an agreement, upon sufficient consideration." In all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal. This thing, which is the price or motive of the contract, we call the consideration; and it must be a thing lawful in itself, or else the contract is void.

Necessity of consideration. A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum,* or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it. As if one man promises to give another 100*l.*, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honor or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted the maxim of the civil law, that *ex nudo pacto non oritur actio* (an action cannot be founded on a barren or gratuitous contract). But any degree of reciprocity will prevent the pact from being nude: nay, even if the thing be

founded on a prior moral obligation (as a promise to pay a just debt, though barred by the statute of limitations), it is no longer *nudum pactum*. And as this rule was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, it therefore does not hold in some cases, where such promise is authentically proved by sealed documents. For if a man enters into a voluntary bond he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond, from the solemnity of the instrument, is a binding obligation.

4. Action of debt.—[In order to understand fully the requirement of consideration, which grew up as the foundation of the action of assumpsit, it is necessary to understand the theory of the older forms of contract actions.] The legal acceptation of debt is then a sum of money due by certain and express agreement: as, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specific and does not depend upon any subsequent valuation to settle it. The non-payment of these is an injury, for which the proper remedy is by action of debt, to compel the performance of the contract and recover the specifical sum due. This is the shortest and surest remedy; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a determinate contract; but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of my contract.

And indeed actions of debt are now seldom brought but upon special contracts under seal; wherein the sum due is clearly and precisely expressed: for, in case of such an action upon a simple contract, the plaintiff labors under two difficulties. First, the defendant has here the same advantage as in an action of detinue, that of waging his law, or purging himself of the debt by oath, if he thinks proper. Secondly, in an action of debt the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which, therefore, if the proof varies from the

claim, cannot be looked upon as the same contract whereof the performance is sued for. If, therefore, I bring an action of debt for 30*l.*, I am not at liberty to prove a debt of 20*l.* and recover a verdict thereon; any more than if I bring an action of detinue for a horse, I can thereby recover an ox. For I fail in the proof of that contract, which my action or complaint has alleged to be specific, express and determinate. *Here the demand is not a fixed certain sum.* But in an action on the case, on what is called an *indebitatus assumpsit* (being indebted he undertook), which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied assumpsit, and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. For if any debt be proved, however less than the sum demanded, the law will raise a promise *pro tanto* (for so much), and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant being indebted to me in 30*l.* undertook or promised to pay it, but failed; and lay my damages arising from such failure at what sum I please; and the jury will, according to the nature of my proof, allow me either the whole in damages, or any inferior sum. And even in actions of debt, where the contract is proved or admitted, if the defendant can show that he has discharged any part of it, the plaintiff shall recover the residue.

[It was but a short time after Blackstone's day that the plaintiff was allowed to recover in debt even if he could not prove the exact amount alleged and sued for; yet it was still true that the action of debt lay only for a sum certain. The plaintiff must claim some fixed sum that is due to him. He must resort to assumpsit or covenant if unliquidated sums are to be claimed by way of damages for breach of contract. II Pollock & Maitland, Hist. Eng. Law, p. 216.]

5. **Foundation of debt in quid pro quo.**—["In the case of money lent, the price of goods sold and arrears of rent due upon a lease for years, the defendant has received something from the plaintiff. To use the phrase which has come to be adopted, he obviously has *quid pro quo*. At the end of the thirteenth

century it is doubtful whether the action extended beyond those cases in which the defendant had received some material thing or some service from the plaintiff. The courts gradually extend the action outwards from a typical debt. It is thought of as an action whereby a man recovers what belongs to him. It has its root in the money loan; for a very long time it is chiefly used for the recovery of money which has been lent. The case of the unpaid vendor is not—this is soon seen—essentially different from the lender: he has parted with property and demands a return. It enters no one's head that a promise is the ground of this action. No pleader propounding such an action will think of beginning his count with the words, 'Whereas the defendant promised to pay;' he will begin with 'Whereas the plaintiff lent (or as the case may be) sold or leased to the defendant.' In short, he will mention some *causa debendi* (ground of the obligation) and that ground will not be a promise. If you sue in debt you must rely on loan, sale, or some other similar transaction. At a later time, various transactions have been pronounced to be similar to loan and sale, and an attempt is made to define them by one single phrase, or, in other words, to discover the common element in the *legitimae causae debendi* (meritorious grounds of the obligation). This is found in the doctrine of *quid pro quo.*" II Pollock & Maitland, Hist. Eng. Law, pp. 211, 212.]

6. **Covenant.**—[The theory of an obligation arising from a promise under seal does not involve any element corresponding to the *quid pro quo* in debt or to consideration in assumpsit; for the covenant was binding from its solemn and ceremonial form, from the manner in which the intention to be bound was expressed. Covenant is the only remedy for the recovery of unliquidated damages for breach of a promise under seal. One limitation, however, soon became apparent. "The action of covenant could not be employed for the recovery of a debt, even though the existence of the debt is attested by a sealed instrument. The law is economical; the fact that a man has one action is a reason for not giving him another." II Pollock & Maitland, Hist. Eng. Law, p. 219; III Street, Foundations Legal Liability, pp. 119, 120. Covenant came, however, to be permitted in the case of a sealed debt, where there was an express covenant to pay the debt.]

7. Scope of general assumpsit.—[General assumpsit or *indebitatus assumpsit* (being indebted he promised) is, in its essence, an action upon the case in the nature of debt upon simple contract. It is the modern remedy which has been developed wherever there is a simple contract debt or a claim for money in the nature of such a debt. While it is concurrent with the ancient action of debt in the field of simple contract debts it has never been extended into the field of record or specialty debts; this for the reason that the action of debt and covenant afforded ample relief and these obligations were said to be of a higher nature than the simple assumpsit or informal promise.]

Not based on actual promise. [General assumpsit is the great residuary remedy in the field of obligation, as is case in the field of tort, and is supplemental to special assumpsit. It lies to enforce any unilateral obligation to pay money not based purely on express promise and therefore already covered by special assumpsit or covenant. It may be used, also, where the purformance of an express promise has given rise to a debt.]

Case ultimate resort. [Since the theory of general assumpsit is limited to obligations in the nature of debt to pay money, an action on the case is still the ultimate resort for certain miscellaneous obligations of a different sort not arising from a debt, promise or covenant. Among such miscellaneous obligations imposed by law are implied warranties in sales, the duty of the innkeeper to receive guests, or to keep their goods safely, the duty of the carrier, founded upon the nature of his calling and the custom of the realm, to receive goods and carry them safely; the duty of public officials such as sheriffs to fulfill the functions of their office.]

8. The common counts.—[The common counts, which are convenient formulæ of declaring in general assumpsit upon an implied promise arising from indebtedness created by certain common transactions, as for services performed, goods sold and delivered, money paid or money had and received, are described by Blackstone in substance as follows:]

Quantum meruit for work and labor. If I employ a person to transact my business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labor deserved. And if I neglect to make him amends, he has

a remedy for this injury by bringing his action on the case upon this implied assumpsit; wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an assumpsit on a *quantum meruit*.

Quantum valebat for goods sold and delivered. There is also an implied assumpsit on *quantum valebat* (as much as it was worth), which is very similar to the former, being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes that both parties did intentionally agree that the real value of the goods should be paid; and this count lies accordingly, if the vendee refuses to pay that value.

Money lent or paid at request. Where a person has either loaned or laid out and expended his own money for the use of (*i. e.*, on behalf of) another, at his request, this creates a debt and the law implies a promise of repayment, and a common count will lie on this assumpsit.

Assumpsit on account stated. Likewise, upon a stated account between two merchants, or other persons, the law implies that he against whom the balance appears has engaged to pay it to the other; though there be not any actual promise. And upon this implication it is frequent for general assumpsit to be brought, declaring that the plaintiff and defendant had settled their accounts together, *insimul computassent* (which gives name to this species of assumpsit), and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it. An action of indebitatus assumpsit also lies for the balance of account due as the result of numerous mercantile transactions, even where no account has been stated.

Money had and received. A fifth species of implied assumpsit is of very extensive application, being wherever one has had and received money belonging to another, without any equivalent given on the receiver's part; for the law construes this to be money had and received for the use of the owner only; and implies that the person so receiving promised and undertook to

account for it to the true proprietor. Thus where money is delivered by A to B to be turned over to C; if C unjustly detains it, an action for money had and received lies against him for the breach of such implied promise and undertaking and he will be made to repay the plaintiff an equivalent for what he has detained in violation of his duty and supposititious promise. This is a very extensive and beneficial remedy, applicable not only to debts for money lent but also to quasi-contracts which arise in almost every case where the defendant has received money which *ex aequo et bono* (by equity and right) he ought to refund. It lies on the quasi-contractual duty to refund money paid by mistake, or on a consideration which happens to fail, or obtained through imposition, extortion, or oppression, or where any undue advantage is taken of the plaintiff's situation.

Common counts for proceeds of conversion. [General assumpsit is available in the case of certain obligations which arise from the commission of a tort. Thus where a converter has sold the misappropriated property, the owner may declare in assumpsit as for money had and received. Although the normal remedy is in trover for the tort, the owner may ratify the act and allege that the sale was made for his benefit; the defendant being disabled from taking advantage of his own wrong and showing that his act was in fact tortious. Thus the obligation enforced is that of disgorging the proceeds of an unlawful acquisition.]

Not for mere damage. [Where the converter has not turned the property into money, but has retained it for his own use, the owner may (in some jurisdictions) declare in assumpsit as for goods bargained and sold, upon the obligation to pay the price of the fictitious sale which the wrongdoer cannot deny. General assumpsit thus becomes a remedy concurrent with trover. But where damages are caused by trespass or otherwise, and the loss of the plaintiff is not accompanied by an unjust acquisition and enrichment of the tort-feasor there is no basis for an obligation based on *quid pro quo* in the nature of debt and the only liability is in tort for the wrong done.]

9. Action of account for certain obligations of uncertain amount.—[Where in a claim for money due the amount sought to be recovered was uncertain and unliquidated, an action of

debt could not be brought. Such a situation frequently occurs in the case of agents charged with handling for profit the money or goods of another. Such persons were known under the old common laws as "bailiffs" and included factors, commission merchants, partners and guardians of a ward's estate. They received property for the purpose of handling and caring for it or using it to produce an income for the owner. The obligation to account for the proceeds of the property is an incident to the fiduciary relation, and is a necessary corollary to the right to profits and proceeds. It would be of little avail to have an abstract right to profits, in a partnership for instance, unless it were possible to investigate their amount, and where necessary the courts will enforce this right. The obligation to account is one created by law, not founded on contract, but upon the relationship.]

Accounting results in debt. [Accordingly if no settlement of accounts could be made between creditor and accountant the legal remedy was by action of account to compel the defendant to render a just account to the plaintiff. In this action if the plaintiff succeeds there are two judgments: The first is that the defendant do account before auditors appointed by the court; and, when such account is finished, then the second judgment is, that he do pay the plaintiff so much as he is found in arrear. If the balance, as it transpires, is in favor of the defendant, the accounting having converted the balance into a debt, the defendant can sue for it and recover in an action of debt.]

Remedy in equity. [It was found by experience that the most ready and effectual way to settle these matters of account was by bill in a court of equity for an accounting, where the defendant could be compelled to make "discovery" or answer questions under oath, and the plaintiff did not have to rely on evidence which he was able to produce; for at law the parties were formerly not competent witnesses; wherefore actions of account, to compel a man to bring in and settle his accounts at law, became almost entirely obsolete. The action of indebitatus assumpsit has inherited the jurisdiction formerly possessed by an account in all cases where the amount due can be determined by means of legal machinery, and courts of equity have from an early time assumed jurisdiction to compel an accounting not only where there is a legal obligation to account but also in many other

cases where there is a long series of complicated transactions and the amount due is difficult to ascertain.]

10. Assignment of choses in action.—Debts could not be transferred to another person by the strict rules of the ancient common law, for no chose in action could be assigned or granted over, because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded: though, in compliance with the ancient principle, the form of assigning a chose in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And, therefore, when in common acceptation a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee. But the king is an exception to this general rule, for he might always either grant or receive a chose in action by assignment: and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a chose in action, as much as the law will that of a chose in possession.

11. Negotiable instruments.—But there is one species of debts which by custom of merchants has become transferable or negotiable. These are debts by bills of exchange and promissory notes.

A bill of exchange is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A lives in Jamaica, and owes B, who lives in England, 1000*l.*, now if C be going from England to Jamaica, he may pay B this 1000*l.*, and take a bill of exchange drawn by B in England upon A in Jamaica, and receive it when he comes thither. Thus does B receive his debt, at any distance of place, by transferring it to C; who carries over his money in paper credit, without danger

of robbery or loss. In common speech such a bill is frequently called a draft, but a bill of exchange is the more legal as well as mercantile expression. The person, however, who writes this letter is called in law the drawer, and he to whom it is written the drawee; and the third person, or negotiator, to whom it is payable (whether especially named, or the bearer generally), is called the payee.

These bills are either foreign or inland; foreign, when drawn by a merchant residing abroad upon his correspondent in England, or vice versa; and inland, when both the drawer and drawee reside within the kingdom.

Promissory notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These also, by the same statute, 3 and 4 Ann. c. 9, are made assignable and indorsable in like manner as bills of exchange.

Negotiability. The payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession but in action) by the express contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his implied contract, *viz.:* that, provided the drawee does not pay the bill, the drawer will: for which reason it is usual in bills of exchange to express that the value thereof hath been received by the drawer; in order to show the consideration, upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man; contrary to the general rule of the common law, that no chose in action is assignable: which assignment is the life of paper credit. It may therefore be of some use to mention a few of the principal incidents attending this transfer or assignment, in order to make it regular, and thereby to charge the drawer with the payment of the debt to other persons than those with whom he originally contracted.

Transfer by indorsement. In the first place, then, the payee, or person to whom or whose order such bill of exchange or promissory note is payable, may by indorsement, or writing his name in *dorso,* or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of

whom is then called the indorsee; and he may assign the same to another, and so on in infinitum. And a promissory note, payable to A, or bearer, is negotiable without any indorsement, and payment thereof may be demanded by any bearer of it.

Presentation for acceptance. But, in case of a bill of exchange, the payee, or the indorsee (whether it be a general or a particular indorsement), is to go to the drawee, and offer his bill for acceptance; which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill.

Acceptance. If the drawee accepts the bill, either verbally or in writing, he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment.

Protest for non-acceptance. If the drawee refuses to accept the bill, and it be of the value of 20*l.* or upwards, and expressed to be for value received, the payee or indorsee may protest it for non-acceptance; which protest must be made in writing; under a copy of such bill of exchange, by some notary public; or if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must, within fourteen days after, be given to the drawer.

Protest for non-payment.—But in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due (which three days are called days of grace), the payee or indorsee is then to get it protested for non-payment, in the same manner, and by the same persons who are to protest it in case of non-acceptance, and such protest must also be notified within fourteen days after to the drawer.

Drawer's liability. And he, on producing such protest, either of non-acceptance, or non-payment, is bound to make good to the payee, or indorsee, not only the amount of the said bills (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law), but also interest and all charges to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill.

Notice to drawer. The bill, when refused, must be demanded of the drawer as soon as conveniently may be: for though, when one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid when due, the person to whom it is payable shall in convenient time give the drawer notice thereof; for otherwise the law will imply it paid; since it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time: when in the meantime all reckonings and accounts may be adjusted between the drawer and the drawee.

Liability of prior indorser. If the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer or indorser, or, if the bill has been negotiated through many hands, upon any of the indorsers; for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorser, as of the drawer. And if such indorser, so called upon, has the names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first indorser has nobody to resort to but the drawer only.

Similar rules apply to promissory notes. What has been said of bills of exchange is applicable also to promissory notes, that are indorsed over, and negotiated from one hand to another; only that, in this case, as there is no drawee, there can be no protest for non-acceptance; or rather the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange, against the prior indorsers.

12. Resumé of contract actions.—[The following are the forms of action available at common law for debts, contracts and other obligations:

(1) *Debt.* To recover a liquidated or fixed sum of money, due upon bond, judgment, covenant, or receipt of a quid pro quo (simple contract).

(2) *Covenant.* To recover unliquidated damages for breach of a covenant, or promise under seal.

(3) *Assumpsit (Special).* To recover damages for breach of a simple contract, or promise based on a consideration.

(4) *General assumpsit.* To recover debts or money due, on the theory of an implied promise to pay for a quid pro quo received under a contract, or for benefits received under a quasi-contract.

(5) *Account.* To enforce the obligation to account for proceeds of another's property in hands of a fiduciary.

(6) *Case.* Miscellaneous obligations not in the nature of debt.]

PART V

LAW OF PERSONAL PROPERTY

CHAPTER XIX.

TITLE TO THINGS PERSONAL BY OCCUPANCY OR PRODUCTION.

1. **Lesser dignity of chattels in old law.**—Under the name of things personal are included all sorts of things movable, which may attend a man's person wherever he goes; and, therefore, being only the objects of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and immovable, as lands and houses and the profits issuing thereout. These being constantly within the reach, and under the protection of the law, were the principal favorites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded as only a transient commodity. The amount of it indeed was comparatively very trifling, during the scarcity of money and the ignorance of luxurious refinements, which prevailed in the feudal ages. Hence it was, that a tax of the fifteenth, tenth, or sometimes a much larger proportion, of all the movables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our ancient historians, though now it would justly alarm our opulent merchants and stockholders. And hence, likewise, may be derived the frequent forfeitures inflicted by the common law, of all a man's goods and chattels,

for misbehaviors and inadvertencies that at present hardly seem to deserve so severe a punishment. Our ancient law-books, which are founded upon the feudal provisions, do not, therefore, often condescend to regulate this species of property. There is not a chapter in Britton, or the Mirror, that can fairly be referred to this head; and the little that is to be found in Glanvil, Bracton, and Fleta, seems principally borrowed from the civilians.

Modern importance. But of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented its quantity, and, of course, its value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty: and have adopted a more enlarged and less technical mode of considering the one than the other; frequently drawn from the rules which they found already established by the Roman law, wherever those rules appeared to be well grounded, and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times, preserving withal a due regard to ancient usages, and a certain feudal tincture, which is still to be found in some branches of personal property.

2. Chattels—Personal and real.—But things personal, by our law, do not only include things movable, but also something more: the whole of which is comprehended under the general name of chattels, which Sir Edward Coke says is a French word, signifying goods. The appellation is in truth derived from the technical Latin word, *catalla:* which primarily signified only beasts of husbandry, or (as we still call them) cattle, but in its secondary sense was applied to all movables in general. Chattels therefore are distributed by the law into two kinds; chattels real, and chattels personal.

Chattels real, saith Sir Edward Coke, are such as concern, or savor of, the realty; as terms for years of land, wardships in chivalry (while the military tenures subsisted), the next presentation to a church, estates by a statute-merchant, statute-staple, *elegit,* or the like. And these are called real chattels, as being interests issuing out of, or annexed to, real estates: of which they have one quality, viz.: immobility, which denominates them real; but want the other, viz.: a sufficient, legal, indeterminate duration; and this want it is that constitutes them chattels.

Chattels personal are, properly and strictly speaking, things movable; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and everything else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is that we are principally to speak in the remainder of this part; postponing the consideration of the nature of chattels real, and their incidents, to the following part on the Law of Real Property.

Chattel interests being thus distinguished and distributed, it will be proper to consider, first, the nature of that property, or dominion, to which they are liable; which must be principally, nay solely, referred to personal chattels: and, secondly, the title to that property, or how it may be lost and acquired. Of each of these in its order.

3. Property in possession or in action.—Property in chattels personal may be either in possession; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or else it is in action; where a man hath only a bare right, without any occupation or enjoyment. And of these the former, or property in possession, is divided into two sorts, an absolute and a qualified property.

First, then, of property in possession absolute. Such may be all inanimate things, as goods, plate, money, jewels, implements of war, garments and the like: such also may be all vegetable productions, as the fruit or other parts of a plant, when severed from the body of it; or the whole plant itself, when severed from the ground; none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him injury, which it is the business of the law to prevent or remedy. Of these, therefore, there remains little to be said. Of qualified interests in property we shall speak later.

Choses in action. We will proceed next to take a short view of the nature of property in action, or such where a man hath merely a bare right to recover a debt or damages or possession by a suit or action at law; from whence the thing so recoverable is called a thing or chose in action. Thus, money due on a bond is a chose in action; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no pos-

session until recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a chose in action; for, though a right to some recompense vests in me at the time of the damage done, yet what, and how large such recompense shall be, can only be ascertained by verdict: and the possession can only be given me by legal judgment and execution. But while the thing, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a chose in action; being a thing rather *in potentia* (in possibility) than *in esse* (in being): though the owner may have as absolute a property in, and be as well entitled to, such things in action, as to things in possession.

4. Occupancy, the original source of title.—We are next to consider the title to things personal, or the various means of acquiring, and of losing, such property as may be had therein: both which considerations of gain and loss shall be blended together in one and the same view; since it is for the most part impossible to contemplate the one, without contemplating the other also. And these methods of acquisition or loss are principally: (1) By occupancy. (2) By gift. (3) By sale. (4) By marriage. (5) By testament or distribution on death.

And, first, a property in goods and chattels may be acquired by occupancy: which, we have more than once remarked, was the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged, by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments, legacies, and administrations, have been introduced and countenanced, in order to transfer and continue that property and possession in things personal, which has once been acquired by the owner. And where such things are found without any other owner, they for the most part belong to the king by virtue of his prerogative; except in some few instances, wherein the original and natural right of occupancy is still permitted to subsist, and which we are now to consider.

5. Wild animals in general open to occupancy.—With regard to animals *ferœ naturæ,* all mankind had by the original grant of the Creator a right to pursue and take any

fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his qualified property, or if dead, are absolutely his own; so that to steal them, or otherwise invade this property, is, according to their respective values, sometimes a criminal offence, sometimes only a civil injury. The restrictions which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, aerial, or aquatic animals as go under the denomination of game; the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege. But those animals which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories; in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly: but the difference, at present made, arises merely from the positive municipal law.

6. **Game laws.**—In the first place, then, we have already shown, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are feræ naturæ, and therefore the property of nobody, but liable to be seized by the first occupant. Therefore, wild beasts and birds, and all animals which are produced in air, sea, or earth, when taken by any one, immediately become his property by the law of nature. For that which belongs to no one, belongs by natural reason to the first taker. But it follows from the very end and constitution of society, that this natural right as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community. This restriction may be either with respect to the place in which this right may or may not be exercised; with respect to the animals that are the subject of this right; or with respect to the persons allowed or forbidden to exercise it. And, in consequence of this authority,

we find that the municipal laws of many nations have exerted such power of restraint; have in general forbidden the entering on another man's grounds, for any cause, without the owner's leave; have extended their protection to such particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he shall authorize.

Many reasons have concurred for making these constitutions: as, (1) For the encouragement of agriculture and improvement of lands, by giving every man an exclusive dominion over his own soil. (2) For preservation of the several species of these animals, which would soon be extirpated by a general liberty. (3) For prevention of idleness and dissipation in husbandmen, artificers, and others of lower rank; which would be the unavoidable consequence of universal license. (4) For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people; which last, is a reason oftener meant than avowed by the makers of forest or game laws. Nor, certainly, in these prohibitions is there any natural injustice, as some have weakly enough supposed; since, as Puffendorf observes, the law does not hereby take from any man his present property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy; which indeed the law of nature would allow him, but of which the laws of society have in most instances very justly and reasonably deprived him. Yet, however defensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must notwithstanding, acknowledge that, in their present shape, they owe their immediate original to slavery.

7. Trespasser and landowner.—It is held, indeed, that if a man starts any game within his own grounds, and follows it into another's and kills it there, the property remains in himself. And this is grounded on reason and natural justice: for the property consists in the possession; which possession commences by the finding it in his own liberty, and is continued by the immediate pursuit. And so if a stranger starts game in one man's chase or free warren, and hunts it into another liberty, the property continues in the owner of the chase or warren; this property arising from privilege, and not being changed by the act of a

mere stranger. Or if a man starts game on another's private grounds and kills it there, the property belongs to him in whose ground it was killed, because it was also started there; this property arising *ratione soli.* Whereas, if, after being started there, it is killed in the grounds of a third person, the property belongs not to the owner of the first ground, because the property is local; nor yet to the owner of the second, because it was not started in his soil; but it vests in the person who started and killed it, though guilty of a trespass against both the owners. [These distinctions are now of very doubtful soundness.—Ed. See M. A. L., Personal Property.]

8. **Conditional title while living.**—A qualified property may subsist in animals *feræ naturæ* while living, by a man's reclaiming and making them tame by art, industry, and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty, as in case of deer confined in a park, or rabbits in an enclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond. These are no longer the property of a man, than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi* (the intention of returning), which is only to be known by their usual custom of returning. The law therefore extends this possession farther than the mere manual occupation; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property; for he hath *animum revertendi.* So are my pigeons, that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester; all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure; or if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him: but otherwise, if the

deer has been long absent without returning, or the swan leaves the neighborhood.

Bees also are *ferœ naturæ;* but when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law. And to the same purpose, not to say in the same words, with the civil law, speaks Bracton: occupation, that is, hiving or including them, gives the property in bees; for though a swarm light upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nests thereon, and therefore if another hives them, he shall be their proprietor: but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them; and in these circumstances no one else is entitled to take them.

In all these creatures, reclaimed from the wildness of their nature, the property is not absolute but defeasible: a property, that may be destroyed if they resume their ancient wildness and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *ferœ naturæ* again; and are free and open to the first occupant that hath ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly mine; and an action will lie against any man that detains them from me, or unlawfully destroys them.

9. **Increase of domestic animals.**—Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that *"partus sequitur ventrem"* (the offspring follows the condition of the mother) in the brute creation, though for the most part in the human species it disallows that maxim. And therefore in the laws of England, as well as Rome, *"si equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natum est"* (if my mare be with foal by your horse, the offspring is not yours but mine). And, for this Puffendorf gives a sensible reason: not only because the male is frequently unknown; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with great expense and care: wherefore, as her owner is the loser by her pregnancy,

he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets: which belong equally to the owner of the cock and hen, and shall be divided between them. But here the reasons of the general rule cease, and *"cessante ratione cessat et ipsa lex"* (the reason ceasing the law itself ceases): for the male is well known, by his constant association with the female; and for the same reason the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other.

10. Title by finding.—If one is possessed of a jewel and casts it into the sea or a public highway, this is an express abandonment. Whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure; for these are vested by law in the king, and form a part of the ordinary revenue of the crown.

[Unless lost property is abandoned it is not open to occupancy. If the owner loses his jewel, and it is found by another, the finder acquires no title therein against the loser who lost or dropped it by accident, although he gains a right of possession against the whole world except the true owner, and may rely on his possession as title against all third parties. Finders of lost property who misappropriate it when there are reasonable means of discovering the owner become guilty of conversion and even of larceny.]

11. Treasure-trove.—[We shall now consider certain limitations on acquiring title by finding which were imposed at common law by royal prerogative.] Treasure-trove (derived from the French word trover, to find), called in Latin *thesaurus inventus,* is where any money or coin, gold, silver, plate, or bullion, is found hidden in the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the king; but if he that hid it be known, or afterwards found out, the owner, and not the king, is entitled to it. Also if it be found in the sea, or upon the earth, it doth not belong to the king, but the finder, if no owner appears. So that it seems

it is the hiding, and not the abandoning of it, that gives the king a property: Bracton defining it, in the words of the civilians, to be *"vetus depositio pecuniæ"* (the previous concealment of the money).

This difference clearly arises from the different intentions, which the law implies in the owner. The man that hides his treasure in a secret place evidently does not mean to relinquish his property, but reserves a right of claiming it again, when he sees occasion; and if he dies, and the secret also dies with him, the law gives it to the king, in part of his royal revenue. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it; and therefore it belongs, as in a state of nature, to the first occupant, or finder, unless the owner appear and assert his right, which then proves that the loss was by accident, and not with an intent to renounce his property. Formerly all the treasure-trove belonged to the finder; as was also the rule of the civil law. Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the king; which part was assigned to all hidden treasure; such as is casually lost and unclaimed, and also such as is designedly abandoned, still remaining the right of the fortunate-finder.

12. **Wrecks.**—Another royal revenue is that of shipwrecks; which are declared to be the king's property by the statute 17 Edw. II, c. 11, and were so, long before, at the common law. It is worth observation, how greatly the law of wrecks has been altered, and the rigor of it gradually softened in favor of the distressed proprietors. Wreck, by the ancient common law, was where any ship was lost at sea, and the goods or cargo were thrown upon the land; in which case these goods so wrecked were adjudged to belong to the king, for it was held that by the loss of the ship all property was gone out of the original owner. But this was undoubtedly adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore it was first ordained by King Henry I, that if any person escaped alive out of the ship, it should be no wreck. Afterwards, in the statute of Westminster the first, the time of limitations of claims, given by the charter of Henry II, is extended to a year and a

day, according to the usage of Normandy; and it enacts, that if a man, a dog, or a cat escape alive, the vessel shall not be adjudged a wreck. These animals, as in Bracton, are only put for examples; for it is now held, that not only if any live thing escape, but if proof can be made of the property of any of the goods or lading which come to shore, they shall not be forfeited as wreck.

Jetsam and flotsam. It is to be observed, that in order to constitute a legal wreck the goods must come to land. If they continue at sea, the law distinguishes them by the barbarous and uncouth appellations of jetsam, flotsam and ligan. Jetsam is where goods are cast into the sea, and there sink and remain under water: flotsam is where they continue swimming on the surface of the waves; ligan is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again. These are also the king's, if no owner appears to claim them; but if any owner appears, he is entitled to recover the possession. For, even if they be cast overboard without any mark or buoy, in order to lighten the ship, the owner is not by this act of necessity construed to have renounced his property; much less can things ligan be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These three are therefore accounted so far a distinct thing from the former, that by the king's grant to a man of wrecks, things jetsam, flotsam and ligan will not pass.

Wrecks, in their legal acception, are at present not very frequent; for, if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not able to assert his property within the year and day limited by law.

13. Waifs.—Waifs or *bona waviata* are goods stolen, and waived or thrown away by the thief in his flight, for fear of being apprehended. These are given to the king by the law, as a punishment upon the owner, for not himself pursuing the felon, and taking away his goods from him.

14. Estrays.—These are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them; in which case the law gives them to the king as the general owner and lord paramount of the soil, in recompense for the damage which they may have done therein: and

they now most commonly belong to the lord of the manor, by special grant from the crown. But, in order to vest an absolute property in the king, or his grantees, they must be proclaimed in the church and two market towns next adjoining to the place where they are found: and then, if no man claims them, after proclamation and a year and a day passed, they belong to the king or his substitute without redemption; even though the owner were a minor, or under any other legal incapacity. If the owner claims them within the year and day he must pay the charges of finding, keeping and proclaiming them. The king or lord has no property till the year and day passed: for if a lord keepeth an estray three-quarters of a year, and within the year it strayeth again, and another lord getteth it, the first lord cannot take it again. [But query.—Ed.]

15. Reason for royal prerogative.—Besides the particular reasons before given why the king should have the several revenues of royal fish, shipwrecks, treasure-trove, waifs, and estrays, there is also one general reason which holds for them all; and that is, because they are *bona vacantia,* or goods in which no one else can claim a property. And therefore by the law of nature they belong to the first occupant or finder; and so continued under the imperial law. But, in settling the modern constitutions of most of the governments in Europe, it was thought proper (to prevent the strife and contention, which the mere title of occupancy is apt to create and continue, and to provide for the support of public authority in a manner the least burthensome to individuals), that these rights should be annexed to the supreme power by the positive laws of the state. And so it may be attributed perhaps to the general principle of their being *bona vacantia,* that they are vested in the king, as well to preserve the peace of the public, as in trust to employ them for the safety and ornament of the commonwealth.

There is also a kind of prerogative copyright subsisting in certain books, which is held to be vested in the crown upon different reasons. Thus, (1) The king, as the executive magistrate, has the right of promulgating to the people all acts of state and government. This gives him the executive privilege of printing, at his own press, or that of his grantees, all acts of parliament, proclamations, and orders of council. (2) As supreme head of the church, he hath a right to the publication of

all liturgies and books of divine service. (3) He is also said to have the right by purchase to the copies of such law-books, grammars, and other compositions, as were compiled or translated at the expense of the crown. And upon these two principles, combined, the exclusive right of printing the translation of the Bible is founded.

16. **Literary Property—Copyright.**—There is still another species of property, which (if it subsists by the common law) being grounded on labor and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke, and many others, to be founded on the personal labor of the occupant. And this is the right which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it appears to be an invasion of that right. Now the identity of a literary composition consists entirely in the sentiment and the language; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other man (it hath been thought) can have a right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind, when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership; it being then a present to the public, like building a church or bridge, or laying out a new highway; but, in case the author sells a single book, or totally grants the copyright, it hath been supposed, in the one case, that the buyer hath no more right to multiply copies of that book for sale, than he hath to imitate for the like purpose the ticket which is bought for admission to an opera or a concert; and that, in the other, the whole property, with all its exclusive rights, is perpetually transferred to the grantee. On the other

hand it is urged that though the exclusive property of the manuscript, and all which it contains, undoubtedly belongs to the author, before it is printed or published; yet, from the instant of publication, the exclusive right of an author or his assigns to the sole communication of his ideas immediately vanishes and evaporates; as being a right of too subtile and unsubstantial a nature to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate.

[There was great uncertainty as to the literary property of authors at the common law. Millar v. Taylor, 4 Burr. 2303.]

But whatever inherent copyright might have been supposed to subsist by the common law, the statute 8 Ann. c. 19 (amended by statute 15 Geo. III, c. 53), hath now declared that the author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, and no longer; and hath also protected that property by additional penalties and forfeitures; directing farther, that if, at the end of that term, the author himself be living, the right shall then return to him for another term of the same duration; and a similar privilege is extended to the inventors of prints and engravings, for the term of eight-and-twenty years, by the statute 8 Geo. II, c. 13, and 7 Geo. III, c. 38, besides an action for damages, with double costs, by statute 17 Geo. III, c. 57. All which parliamentary protections appear to have been suggested by the exception in the statute of monopolies, 21 Jac. I, c. 3, which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue whereof it is held, that a temporary property therein becomes vested in the king's patentee.

17. Title by accession.—The doctrine of property arising from accession is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled, by his right of possession, to the property of it under such its state of improvement: but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or

bread out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts. It hath even been held that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman.

The Roman law adjudged, that if one man wrote anything on the paper or parchment of another, the writing should belong to the owner of the blank materials; meaning thereby the mechanical operation of writing, for which it directed the scribe to receive a satisfaction; for in works of genius and invention, as in painting on another man's canvas, the same law gave the canvas to the painter.

18. **Confusion of goods.**—But in the case of confusion of goods, where those of two persons are so intermixed that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares. But if one willfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavored to be rendered uncertain without his own consent. [Query.—Ed.]

CHAPTER XX.

TITLE BY GIFT AND SALE.

1. Gifts.—We are now to proceed to the discussion of two methods of acquiring a title to property in things personal, which are transfers from the former owner, and answer in some measure to the conveyances of real estates; being those by gift and by sale.

Gifts and sales are thus to be distinguished from each other, that gifts are always gratuitous, sales are upon some consideration or equivalent; and they may be divided, with regard to their subject-matter, into gifts or grants of chattels real, and gifts or grants of chattels personal. Under the head of gifts or grants of chattels real, may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold; though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings, nominally paid to the grantor; and, in case of leases, always reserving a rent, though it be but a pepper-corn: any of which considerations will, in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.

Grants or gifts, of chattels personal, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires all title and interest therein, which may be done either in writing, or by word of mouth, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential.

Delivery. A true and proper gift of chattels personal is always accompanied with delivery of possession, and takes effect immediately, as if A gives to B 100*l.*, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it,

though he did it without any consideration or recompense: unless it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented or imposed upon, by false pretences, ebriety, or surprise. But if the gift does not take effect, by delivery of immediate possession, it is then not properly a gift, but a contract; and this a man cannot be compelled to perform, but upon good and sufficient consideration.

Gifts causa mortis. Besides legacies, contained in a man's will and testament, there is also permitted another death-bed disposition of property; which is called a donation *causa mortis.*

And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods (under which have been included bonds, and bills drawn by the deceased upon his banker), to keep in case of his decease. This gift if the donor dies, needs not the assent of his executor: yet it shall not prevail against creditors: and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causa.*

2. **Sale, or exchange.**—This is a transmutation of property from one man to another, in consideration of some price or recompense in value: for there is no sale without a recompense: there must be *quid pro quo.* If it be a commutation of goods for goods, it is more properly an exchange: but if it be a transferring of goods for money, it is called a sale; which is a method of exchange introduced for the convenience of mankind, by establishing an universal medium, which may be exchanged for all sorts of other property; whereas, if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. All civilized nations adopted, therefore, very early the use of money; for we find Abraham giving "four hundred shekels of silver, current money with the merchant," for the field of Macpelah; though the practice of exchange still subsists among several of the savage nations. But with regard to the law of sales and exchanges there is no difference. I shall, therefore, treat of them both together.

3. When title passes.—As soon as the bargain is struck, the property of the goods is transferred to the vendee, if there is nothing further to be done by the vendor to put the goods in a deliverable state; but the vendee cannot take the goods, until he tenders the price agreed on. But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sells a horse to B for 10*l.*, and B pays him earnest or signs a note in writing of the bargain; and afterwards, before the delivery of the horse, or money paid, the horse dies in the vendor's custody, still he is entitled to the money, because by the contract the property was in the vendee. Thus may property in goods be transferred by sale, where the vendor *hath* such property in himself.

If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for there is no credit, unless the contrary be expressly agreed. And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and the title is transferred to the buyer, but the seller has a lien for the price.

4. Statute of Frauds.—And such regard does the law pay to earnest as an evidence of a contract, that, by the statute, 29 Car. II, c. 3, no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part; or unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract. And with regard to goods under the value of 10*l.* no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, who is to be charged therewith. Anciently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts.

5. Defects in vendor's title.—In general the vendor cannot transfer to the buyer a better title than he himself had. But

property may in some cases be transferred by sale, though the vendor hath none at all in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of law is, that all sales and contracts of anything vendible, in fairs or markets *overt* (that is, open), shall not only be good between the parties, but also be binding on all those that have any right or property therein. [This is not law in the U. S.]

Market overt in the country is only held on special days provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day. The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt; but in London every shop in which goods are exposed publicly to sale is market overt, for such things only as the owner professes to trade in.

Stolen goods. But if my goods are stolen from me, and sold, out of market overt, my property is not altered, and I may take them wherever I find them. And it is expressly provided by statute 1 Jac. I, c. 21, that the sale of any goods, wrongfully taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property: for this, being usually a clandestine trade, is therefore made an exception to the general rule. And even in market overt, if the goods be the property of the king, such sale (though regular in other respects) will in no case bind him; though it binds infants, feme-coverts, idiots, and lunatics, and men beyond sea or in prison: or if the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods.

Knowledge of defect of title. So likewise, if the buyer knoweth the property not to be in the seller; or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme-covert not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound thereby. If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price: unless

the property had been previously altered by a former sale. And notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into the possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice. By which wise regulations the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other necessary policy, that purchasers, bona fide, in a fair, open and regular manner, shall not be afterwards put to difficulties by reason of the previous knavery of the seller.

6. Implied warranty of title and quality.—By the civil law an implied warranty was annexed to every sale, in respect to the title of the vendor; and, so, too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose. So with regard to the goodness of the wares purchased, the vendor is in some cases bound to answer where he impliedly warrants them to be sound, good and merchantable, or fit for some particular use.

[Such an obligation is called in legal language an *implied warranty.*

The law of tort here approaches closely to the sphere of contract. A warranty, or the obligation to make a representation good and fulfill the expectations aroused thereby, in a sale for instance, and liability to compensate for damages resulting from a misguided choice of the inferior article, come to much the same.

Scienter. Knowledge of the falsity of the representation or warranty is essential to make one liable for the wrong of deceit, which is an intentional interference with plaintiff's right of self-protective choice; but an obligation may arise on a warranty in the sale of a chattel, where the seller honestly believes the representation to be true and the article to be as warranted. Where there is a knowledge of the falsity of the affirmation which is the inducing cause of the sale, the tort liability and the contract liability are concurrent—and the plaintiff may sue upon either at his option. But scienter is unnecessary for creation of warranty. This has led to an extension of the law in holding an unauthorized agent liable for breach of an implied warranty of authority where he honestly but mistakenly represents that he

is authorized to act for his supposed principal. Collen v. Wright (1857), 8 El. & Bl. 647; 92 E. C. L. 647.]

There is thus in all sales an implied representation and warranty by which the seller undertakes that the commodity he sells is his own; and if it proves otherwise, an action on the case lies against him, to exact damages for this deceit. In contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy may be had. Also if he, that selleth any thing, doth upon the sale make express representations of facts as to the thing sold, as that a horse is sound, the law annexes a tacit contract to his warranty, that if it be not so, he shall make compensation to the buyer; for which an action on the case will lie to recover damages.

The warranty must be upon the sale; for if it be made after, and not at the time of the sale, it is a void warranty: for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor. But if the vendor knew the goods to be unsound, and hath used any art to disguise them, or if they are in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness. A general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses, as if a horse be warranted perfect, and wants either a tail or an ear, unless the buyer in this case be blind. But if cloth is warranted to be of such a length, when it is not, there an action on the case lies for damages; for that cannot be discerned by sight, but only by a collateral proof, the measuring it. Also, if a horse is warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet as the discernment of such defects is frequently matter of skill, it hath been held that an action on the case lieth to recover damages for this imposition.

CHAPTER XXI.

SPECIAL PROPERTY INTERESTS AND MODIFICATIONS OF OWNERSHIP.

[Having thus examined the different methods of acquiring title to personal property, we may add a word or two as to the various modifications of absolute individual dominion, or ownership, by which different persons are given interests of a qualified or special nature therein.]

1. Nature of bailments.—Bailment, from the French bailler, to deliver, is a delivery of possession of goods to another person for a particular use, upon a contract, express or implied, that the bailee shall keep them carefully and return them to the bailor when the purpose of the bailment is accomplished, or shall otherwise deliver them according to directions. As if cloth be delivered, or (in our legal dialect) bailed, to a tailor to make a suit of clothes, he has it upon an implied contract to render it again when made, and that in a workmanly manner. If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay or carry them to the person appointed. If a horse, or other goods, be delivered to an innkeeper or his servants, he is bound to keep them safely, and restore them when his guest leaves the house. If a man takes in a horse, or other cattle, to graze and depasture in his grounds, which the law calls agistment, he takes them upon an implied contract to return them on demand to the owner.

If a pawnbroker receives plate or jewels as a pledge, or security for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time. And so if a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainors, and they are bound by an implied contract in law to restore them on payment of the debt, duty

and expenses, before the time of sale: or, when sold, to render back the overplus.

2. **Obligation of depositary.**—If a friend delivers anything to his friend to keep for him, the receiver is bound to restore it on demand; and it was formerly held that in the meantime he was answerable for any damage or loss it might sustain, whether by accident or otherwise; unless he expressly undertook to keep it only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled, that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud; but, if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them as a prudent man would take of his own.

3. **Division of ownership between bailor and bailee.**—Hiring and borrowing are also bailments by which a qualified property may be transferred to the hirer or borrower: in which there is only this difference, that hiring is always for a price, a stipend, or additional recompense; borrowing is merely gratuitous. But the law in both cases is the same. They are both bailments whereby the possession and a transient property is transferred for a particular time or use, on condition to restore the goods so hired or borrowed, as soon as the time is expired or use performed; together with the price or stipend (in case of hiring) either expressly agreed on by the parties, or left to be implied by law according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use it with moderation, and not to abuse it; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward.

Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered: for the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee, on account of his immediate possession; the bailor, because the possession of the bailee is, mediately, his possession also. So also in case of goods pledged or pawned upon condi-

tion, either to repay money or otherwise; both the pledger and pledgee have a qualified, but neither of them an absolute, property in them: the pledger's property is conditional, and depends upon the performance of the condition of repayment, &c.; and so, too, is that of the pledgee, which depends upon its non-performance. But a servant who has the care of his master's goods, as a butler of plate, a shepherd of sheep, and the like, has not the possession as bailee, but only a mere charge or custody for his master.

4. Bailee's special property.—In all cases of bailment there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution: the bailor having still left in him the right to a chose in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distrainor, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person. For, being responsible to the bailor, if the goods are lost or damaged by his wilful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may have purloined or injured them; that he may always be ready to answer the call of the bailor.

5. Future interests in chattels.—By the rules of the ancient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were generally tolerated and allowed. But yet in last wills and testaments such limitations of personal goods and chattels, in remainder after a bequest for life, were permitted: though originally that indulgence was only shewn, when merely the use of the goods, and not the goods themselves, was given to the

first legatee; the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded: and therefore, if a man either by deed or will limits his books or furniture to A for life, with remainder over to B, this remainder is good. But, where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation. For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail; and therefore the law vests in him at once the entire dominion of goods, being analogous to the fee-simple which a tenant in tail may acquire in a real estate.

6. Co-ownership of chattels.—Things personal may belong to their owners, not only in severalty, but also in joint-tenancy and in common, as well as real estates. They cannot, indeed, be vested in coparcenary; because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse or other personal chattel be given to two or more, absolutely, they are joint-tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements. And, in like manner, if the jointure be severed, as, by either of them selling his share, the vendee and the remaining part owner shall be tenants in common, without any *jus accrescendi* or survivorship. So, also, if 100*l.* be given by will to two or more, equally to be divided between them, this makes them tenants in common; as, we have formerly seen, the same words would have done in regard to real estates. But, for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property, and there shall be no survivorship therein.

PART VI

LAW OF REAL PROPERTY

CHAPTER XXII.

ORIGIN OF PROPERTY IN LAND AND TITLE BY OCCUPANCY.

1. Scope of real property; lands, tenements and hereditaments.—The objects of dominion or property are things, as contradistinguished from persons; and things are, by the law of England, distributed into two kinds; things real and things personal. Things real are such as are permanent, fixed and immovable, which cannot be carried out of their place; as lands and tenements: things personal are goods, money, and all other movables; which may attend the owner's person wherever he thinks proper to go.

[The law of real property is in general that branch of the law which regulates the acquisition and transfer of title to land, and the many varieties of estates or interests which may be held by different persons in the same piece of land. Things real are usually said to consist not only in lands, but also in tenements, and hereditaments, but these latter terms merely include land (and a little more beside), under different aspects. Land connotes the physical object of real property, the face of the earth and everything under it or over it. *Cuius est solum, eius est usque ad coelum.* Land therefore includes mines of metal, woods, waters and houses as well as fields and meadows.

The term tenement, though in its vulgar or popular usage applied only to cheap buildings rented out to tenants, in its technical legal sense signifies any property right in land or otherwise which was formerly the subject of feudal tenure, and indeed it is impossible to understand the development of the common law regulating landed property, or the English consti-

tution itself, with any degree of insight, without some general acquaintance with the history of the feudal system, which dominated England for several hundred years after the Norman Conquest. Practically all the land in the kingdom was supposed to be granted by and held of the king or some superior lord in whom the ultimate property resided, in consideration of certain services to be rendered the lord by the tenant or possessor of the property. The thing held was styled a tenement, the holder was a tenant, and the relation of the tenant to his lord, involving certain reciprocal obligations, rights and duties, was termed tenure.

[Certain interests in lands such as leaseholds for terms of years were not the subject of feudal tenure, and so not tenements.]

[The term hereditament includes not only rights in land, but also whatsoever may be inherited, and gives to the heir, who was the eldest son in England, and who took to the exclusion of the other children on the death of the ancestor. Personal property on the other hand went to the executor of the deceased owner for distribution equally among the sons and daughters or the next of kin. An heir-loom was some implement of furniture or other movable, which by custom descended to the heir, usually with a house; and although neither land nor tenement, yet being inheritable, it is comprised under the general term hereditament and is considered as real property.]

Heir-looms are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. The termination, loom, is of Saxon original; in which language it signifies a limb or member; so that an heir-loom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold: otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor. But deer in a real authorized park, fishes in a pond, doves in a dovehouse, &c., though in themselves personal chattels, yet they are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests, by either descent or

purchase. For this reason also I apprehend it is, that the ancient jewels of the crown are held to be heir-looms; for they are necessary to maintain the state, and support the dignity, of the sovereign for the time being. Charters likewise, and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained (also door keys), shall pass together with the land to the heir, in the nature of heir-looms, and shall not go to the executor. By special custom, also, in some places carriages, utensils, and other household implements, may be heir-looms; but such custom must be strictly proved. On the other hand, by almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violation or damage, "*quod ab ædibus non facile revellitur,*" is become a member of the inheritance, and shall thereupon pass to the heir; as chimney-pieces, pumps, old fixed or dormant tables, benches, and the like.

2. Origin of property—common ownership first.—[In treating of the law of real property, let us consider first the origin and basis of the institution of private property; the titles, or manner of acquiring and transferring land; and lastly, estates or the various interests which may be held by different persons in the same land, when the ownership is subdivided among them.]

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required. [See R. T. Ely, Property and Contract, Chap. XXII. Theories of the Origin of Private Property.]

These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still

have answered them had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the ancient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, wherein *"erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset"* (all things were common and undivided, as if there were but one patrimony for them all). Not that this communion of goods seems ever to have been applicable, even in the earliest stages, to aught but the substance of the thing; nor could it be extended to the use of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: or, to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force: but the instant that he quitted the use or occupation of it, another might seize it, without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theater, which is common to the public, and yet the place which any man has taken is for the time his own.

3. **Individual ownership develops.**—But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same

thing, or disputing which of them had actually gained it. In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom everything else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was very soon established in every man's house and home-stall; which seems to have been originally mere temporary huts or movable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that movables of every kind became sooner appropriated than the permanent substantial soil; partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labor of the occupant, which bodily labor, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

Animals and wells. The article of food was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of water also a very important point. And therefore the book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established

in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, "because he had digged that well." And Isaac, about ninety years afterwards, reclaimed this his father's property; and after much contention with the Philistines, was suffered to enjoy it in peace.

4. Land open to occupancy.—All this while the soil and pasture of the earth remained still in common as before, and open to every occupant; except perhaps in the neighborhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages; and which, Tacitus informs us, continued among the Germans till the decline of the Roman empire.

We have also a striking example of the same kind in the history of Abraham and his nephew Lot. When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was, that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavored to compose: "Let there be no strife, I pray thee, between thee and me. Is not the whole land before thee? Separate thyself, I pray thee, from me. If thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left." This plainly implies an acknowledged right, in either, to occupy whatever ground he pleased, that was not preoccupied by other tribes. "And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered everywhere, even as the garden of the Lord. Then Lot chose

him all the plain of Jordan, and journeyed east; and Abraham dwelt in the land of Canaan."

Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants; which was practiced as well by the Phœnicians and Greeks as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert, uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in color; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.

5. Private property in land arises—Its consequences.—As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants; and by constantly occupying the same individual spot, the fruits of the earth were consumed, and the spontaneous produce destroyed, without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promised and encouraged, the art of agriculture. And the art of agriculture, by a regular connexion and consequence, introduced and established the idea of a more permanent property in the soil than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labor? Had not therefore a separate property in lands, as well as movables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature. Whereas now (so graciously has Providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it oppor-

tunities of improving its rational faculties, as well as of exerting its natural. Necessity begat property: and in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants: states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labor, for the necessary subsistence of all; and leisure was giving to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

[We shall now proceed to consider the different sorts of titles, or the methods by which rights of property may be acquired and transferred, and what is sufficient to enable one to hold possession or demand possession from others.]

6. Title to land by occupancy.—Occupancy is the taking possession of those things which before belonged to nobody. This as we have seen, is the true ground and foundation of all property, or of holding those things in severalty, which, by the law of nature, unqualified by that of society, were common to all mankind. But when once it was agreed that everything capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating any thing to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognized by the laws of Rome, *quod nullius est, id ratione naturali occupanti conceditur* (that which belongs to no one, is by natural reason granted to the occupant).

The only question remaining is, how this property became actually vested: or what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to everybody, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands, that occupancy gave also the original right to the permanent property in the substance of the earth itself: which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffen-

dorf insisting that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labor, is from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savors too much of nice and scholastic refinement. However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

Possession. Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shews an intention to abandon it; for then it becomes, naturally speaking, *publici juris* (of public right) once more, and is liable to be again appropriated by the next occupant. So, if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary: and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such a case the property still remains in the loser, who may claim it again of the finder. And this we may remember, is the doctrine of the law of England, with relation to treasure trove.

Right of occupancy, so far as it concerns real property (for of personal chattels I am not in this place to speak), hath been confined by the laws of England within a very narrow compass; and was extended only to a single instance: namely, where a man was tenant *pur auter vie,* or had an estate granted to himself only (without mentioning his heirs) for the life of another

man, and died during the life of *cestuy que vie,* or him by whose life it was holden; in this case he that could first enter on the land might lawfully retain the possession, so long as *cestuy que vie* lived, by right of occupancy.

7. **Title by wrongful possession.**—The lowest and most imperfect degree of title consists in the mere naked possession, or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession. This may happen when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a disseisin, being a deprivation of that actual seisin, or corporal freehold of the lands, which the tenant before enjoyed. Or it may happen, that after the death of the ancestor and before the entry of the heir, or after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner may put an end to by a variety of legal remedies, as will more fully appear in the third book of these Commentaries. But in the meantime, till some act be done by the rightful owner to devest this possession and assert his title, such actual possession is, prima facie, evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. And, at all events, without such actual possession no title can be completely good and such possession is a good title against all the world except the true owner.

8. **Title by adverse possession.**—[If a person disseised, or turned out of possession of his estate, neglects to pursue his remedy for the recovery of possession within the time limited by law, the person in possession under claim or color of title will gain a right of possession good against the former owner as well as against third parties. Thus if a trespasser ejects me from my lands under claim of title, he thereby gains a mere naked possession, but if I acquiesce without bringing any action of ejectment until the Statute of Limitations has run against me, then the defective possession of the wrongdoer is quieted

against my claim, and he has a complete title. At common law there lay an elaborate system of writs and real actions for the recovery of seisin or possession of land, which were only gradually lost, but now the Statute of Limitations on the action of ejectment measures the period within which title may be acquired as against other claimants by adverse possession.]

9. Alluvion and dereliction.—Title may be said to be acquired by accession, in lands newly created, by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters. For Bracton tells us, that if an island arise in the middle of a river, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is the proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law. Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores; for if the whole soil is the freehold of any one man, as it usually is whenever a several fishery is claimed there it seems just (and so is the constant practice) that the eyotts or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and the soil. However, in case a new island rise in the sea, though the civil law gives it to the first occupant, yet ours gives it to the king. And as to lands gained from the sea, either by alluvion, by the washing-up of sand and earth, so as in time to make terra firma (firm land); or by dereliction, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex* (the law takes not cognizance of small things): besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry. So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's or the subject's property. In the same manner if a river, run-

man, and died during the life of *cestuy que vie,* or him by whose life it was holden; in this case he that could first enter on the land might lawfully retain the possession, so long as *cestuy que vie* lived, by right of occupancy.

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8. **Title by adverse possession.**—[If a person disseised, or turned out of possession of his estate, neglects to pursue his remedy for the recovery of possession within the time limited by law, the person in possession under claim or color of title will gain a right of possession good against the former owner as well as against third parties. Thus if a trespasser ejects me from my lands under claim of title, he thereby gains a mere naked possession, but if I acquiesce without bringing any action of ejectment until the Statute of Limitations has run against me, then the defective possession of the wrongdoer is quieted

against my claim, and he has a complete title. At common law there lay an elaborate system of writs and real actions for the recovery of seisin or possession of land, which were only gradually lost, but now the Statute of Limitations on the action of ejectment measures the period within which title may be acquired as against other claimants by adverse possession.]

9. Alluvion and dereliction.—Title may be said to be acquired by accession, in lands newly created, by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters. For Bracton tells us, that if an island arise in the middle of a river, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is the proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law. Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores; for if the whole soil is the freehold of any one man, as it usually is whenever a several fishery is claimed there it seems just (and so is the constant practice) that the eyotts or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and the soil. However, in case a new island rise in the sea, though the civil law gives it to the first occupant, yet ours gives it to the king. And as to lands gained from the sea, either by alluvion, by the washing-up of sand and earth, so as in time to make terra firma (firm land); or by dereliction, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex* (the law takes not cognizance of small things): besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry. So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's or the subject's property. In the same manner if a river, run-

man, and died during the life of *cestuy que vie,* or him by whose life it was holden; in this case he that could first enter on the land might lawfully retain the possession, so long as *cestuy que vie* lived, by right of occupancy.

7. **Title by wrongful possession.**—The lowest and most imperfect degree of title consists in the mere naked possession, or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession. This may happen when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a disseisin, being a deprivation of that actual seisin, or corporal freehold of the lands, which the tenant before enjoyed. Or it may happen, that after the death of the ancestor and before the entry of the heir, or after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner may put an end to by a variety of legal remedies, as will more fully appear in the third book of these Commentaries. But in the meantime, till some act be done by the rightful owner to devest this possession and assert his title, such actual possession is, prima facie, evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. And, at all events, without such actual possession no title can be completely good and such possession is a good title against all the world except the true owner.

8. **Title by adverse possession.**—[If a person disseised, or turned out of possession of his estate, neglects to pursue his remedy for the recovery of possession within the time limited by law, the person in possession under claim or color of title will gain a right of possession good against the former owner as well as against third parties. Thus if a trespasser ejects me from my lands under claim of title, he thereby gains a mere naked possession, but if I acquiesce without bringing any action of ejectment until the Statute of Limitations has run against me, then the defective possession of the wrongdoer is quieted

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ning between two lordships, by degrees gains upon the one, and thereby leaves the other dry: the owner who loses his ground thus imperceptibly has no remedy; but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in any other place, as a recompense for this sudden loss.

CHAPTER XXIII.

TITLE BY CONVEYANCE OR TRANSFER.

1. **Feudal restraints on alienation.**—The most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in its limited sense; under which may be comprised any method wherein estates are voluntarily resigned by one man, and accepted by another; whether that be effected by sale, gift, marriage, settlement, devise, or other transmission of property by the mutual consent of the parties.

This means of taking estates by alienation, is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feudal law, a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts; for if he might, the feudal restraint of alienation would have been easily frustrated and evaded. And as he could not aliene it in his lifetime, so neither could he by will defeat the succession, by devising his feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent or presumptive heir.

And therefore it was very usual in ancient feoffments to express that the alienation was made by consent of the heirs of the feoffor; or sometimes for the heir apparent himself to join with the feoffor in the grant. And, on the other hand, as the feudal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his seigniory without the consent of his vassal; for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without

his own approbation; or even to transfer his fealty, without his being thoroughly apprised of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seizing of his cattle by the lord of a neighboring clan.

Attornment. This consent of the vassal was expressed by what was called attorning, or professing to become the tenant of the new lord; which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchaser, and to become his tenant, the grant or contract was in most cases void, or at least incomplete: which was also an additional clog upon alienations.

Freedom of alienation. But by degrees this feudal severity is worn off; and experience hath shown that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. But these restrictions were in general removed, by the statute of *quia emptores,* whereby all persons, except the king's tenants *in capite,* were left at liberty to aliene all or any part of their lands at their own discretion. As to the power of charging lands with the debts of the owner, this was introduced so early as statute Westm. 2, which subjected a moiety of the tenant's lands to executions, for debts recovered by law; as the whole of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus* made the same year, and in a statute staple by statute 27 Edw. III, c. 9, and in other similar recognizances by statute 23 Hen. VIII, c. 6. And now, the whole of them is not only subject to be pawned for the debts of the owner, but likewise to be absolutely sold for the benefit of trade and commerce by the several statutes of bankruptcy. The restraint of devising land by will, except in some places by particular custom, lasted longer; that not being totally removed till the abolition of the military tenures. The doctrine of attornments continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; till at last they were made no longer necessary to complete the grant or conveyance, by statute 4 and 5 Ann. c. 16; nor shall, by statute 11 Geo. II, c. 19, the attornment of

any tenant affect the possession of any lands, unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice.

In examining the nature of alienation, let us first inquire, briefly, who may aliene, and to whom; and then, more largely, how a man may aliene, or the several modes of conveyance.

2. Capacity, or who is capable of conveying and who of purchasing.—Herein we must consider rather the incapacity, than capacity, of the several parties: for all persons in possession are prima facie capable both of conveying and purchasing, unless the law has laid them under any particular disabilities. But, if a man has only in him the right of either possession or property, he cannot convey it to any other, lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed. Yet reversions and vested remainders may be granted; because the possession of the particular tenant is the possession of him in reversion or remainder; but contingencies and mere possibilities, though they may be released, or devised by will or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger, unless coupled with some present interest.

Idiots and persons of insane memory, infants and persons under duress, are not totally disabled either to convey or purchase, but sub modo (in a certain degree) only. For their conveyances and purchases are voidable, but not actually void. In like manner, an infant may waive his purchase or conveyance, when he comes to full age; or if he does not then actually agree to it, his heirs may waive it after him. Persons, also, who purchase or convey under duress, may affirm or avoid such transaction, whenever the duress is ceased. For all these are under the protection of the law; which will not suffer them to be imposed upon, through the imbecility of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such imbecility ceases.

Married women. The case of a feme-covert is somewhat different. She may purchase an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids it by some act declaring his dissent. And, though he does nothing to avoid it, or even if he actually consents, the feme-covert herself may, after the death of her husband, waive

or disagree to the same: nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement. But the conveyance or other contract of a feme-covert (except by some matter of record) is absolutely void, and not merely voidable; and, therefore, cannot be affirmed or made good by any subsequent agreement.

Aliens. The case of an alien born is also peculiar. For he may purchase anything; but after purchase he can hold nothing except a lease for years of a house for convenience of merchandise, in case he be an alien friend; all other purchases (when found by an inquest of office) being immediately forfeited to the king.

3. Various modes of conveying.—We are next, but principally, to inquire how a man may aliene or convey; which will lead us to consider the several modes of conveyance.

Conveyances may be classed as either conveyances at common law, or such as receive their force and efficacy by virtue of the statute of uses.

Of conveyances by the common law, some may be called original or primary conveyances; which are those by means whereof the benefit or estate is created or first arises; others are derivative or secondary; whereby the benefit or estate originally created, is enlarged, restrained, transferred, or extinguished.

Original conveyances are the following: (1) Feoffment; (2) Gift; (3) Grant; (4) Lease; (5) Exchange; (6) Partition: derivative are, (7) Release; (8) Confirmation; (9) Surrender; (10) Assignment; (11) Defeazance.

4. Feoffment or livery of seisin.—A feoffment is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare,* to give one a feud; and therefore feoffment is properly *donatio feudi* (the gift of a fee). It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeoffs, is called the feoffor; and the person enfeoffed is denominated the feoffee. This is plainly derived from, or is indeed itself a very mode of, the ancient feudal donation; for though it may be performed by the word "enfeoff" or "grant," yet the aptest word of feoffment is "*do* or

dedi." And, as in pure feudal donations, the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer, so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed) hath barely an estate for life. For as the personal abilities of the feoffee were originally persumed to be the immediate or principal inducements to the feoffment, the feoffee's estate ought to be confined to his person, and subsist only for his life; unless the feoffor, by express provision in the creation and constitution of the estate, hath given it a longer continuance. These express provisions are indeed generally made; for this was for ages the only conveyance, whereby our ancestors were wont to create an estate in fee-simple, by giving the land to the feoffee, to hold to him and his heirs forever, though it serves equally well to convey any other estate or freehold.

Delivery of possession. But by the mere words of the deed the feoffment is by no means perfected; there remains a very material ceremony to be performed, called livery of seisin; without which the feoffee has but a mere estate at will. This livery of seisin is no other than the pure feudal investiture, or delivery of corporal possession of the land or tenement; which was held absolutely necessary to complete the donation.

Investitures, in their original use, were probably intended to demonstrate in conquered countries the actual possession of the lord; and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peacable and firm possession. And at a time when writing was seldom practiced, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of by-standers who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such as claimed title by other means, might know against whom to bring their actions.

Symbolical delivery. Yet the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be

conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself.

Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Written deeds were therefore introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed; yet still for a very long series of years, they were never made use of, but in company with the more ancient and notorious method of transfer, by delivery of corporal possession.

Livery of seisin, by the common law, was necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made; for they are not the objects of the senses; and in leases for years, or other chattel interests, it is not necessary. In leases for years indeed an actual entry is necessary, to vest the estate in the lessee: for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini*: and when he enters in pursuance of that right, he is then, and not before, in possession of his term, and complete tenant for years. This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the grantor could have done; which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence in *futuro,* because they cannot (at the common law) be made but by livery of seisin; which livery, being an actual manual tradition of the land, must take effect *in præsenti,* or not at all.

Classes of livery. Livery of seisin is either in deed or in law. Livery in deed is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney (for this may as effectually be done by deputy or attorney, as by the principals themselves in person), come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a

twig or bough there growing, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut-to the door, and then open it, and let in the others. If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all; but if they be in several counties, there must be as many liveries as there are counties. For if the title in these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another.

Livery in law is where the same is not made on the land, but in sight of it only; the feoffor saying to the feoffee, "I give you yonder land; enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise; unless he dares not enter, through fear of his life or bodily harm; and then his continual claim, made yearly, in due form of law, as near as possible to the lands, will suffice without an entry. This livery in law cannot, however, be given or received by attorney, but only by the parties themselves.

5. Gifts or donations.—The conveyance by gift, *donatio,* is properly applied to the creation of an estate-tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it; for the operative words of conveyance in this case are *do* or *dedi;* and gifts in tail are equally imperfect without livery of seisin, as feoffments in fee-simple. And this is the only distinction that Littleton seems to take, when he says "it is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee;" viz.: feoffor is applied to a feoffment in fee-simple, donor to a gift in tail, and lessor to a lease for life, or for years, or at will. In common acceptation gifts are frequently confounded with the next species of deeds: which are grants.

6. Grants.—The regular method by the common law of transferring the property of incorporeal hereditaments, or such

things whereof no livery can be had, is by deed of grant. For which reason all corporeal hereditaments, as lands and houses, are said to lie in livery; and the others, as advowsons, commons, rents, reversions, &c., to lie in grant. These, therefore, pass merely by the delivery of the deed. And in seigniories, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite), were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It therefore differs but little from a feoffment, except in its subject-matter; for the operative words therein commonly used are dedi et concessi, "have given and granted."

7. **A lease.**—This is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense), made for life, for years, or at will, but always for a less time than the lessor hath in the premises, for if it be for the whole interest, it is more properly an assignment than a lease. The usual words of operation in it are, "demise, grant, and to farm let: *dimisi, concessi, et ad firmam tradidi.* Farm, or feorme, is an old Saxon word signifying provisions; and it came to be used instead of rent or render, because anciently the great part of rents were reserved in provisions; in corn, in poultry, and the like; till the use of money became more frequent. So that a farmer, *firmarius,* was one who held his land upon payment of a rent or *feorme;* though at present, by a gradual departure from the original sense, the word farm is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments; though livery of seisin is indeed incident and necessary to one species of leases, viz.: leases for life of corporeal hereditaments; but to no other.

Right to lease. Whatever restriction, by the severity of the feudal law, might in times of very high antiquity be observed with regard to leases; yet by the common law, as it has stood for many centuries, all persons seised of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore tenant in fee-simple might let leases of any duration; for he hath the whole interest, but tenant in tail, or tenant for life, could make no leases which should bind the

issue in tail or reversioner; nor could a husband, seised *jure uxoris* (in right of his wife), make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired.

8. **An exchange.**—An exchange is a mutual grant of equal interests, the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution. The estates exchanged must be equal in quantity; not of value, for that is immaterial, but of interest; as fee-simple for fee-simple, a lease for twenty years for a lease for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery. But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance: for each party stands in the place of the other and occupies his right, and each of them hath already had corporal possession of his own land. But entry must be made on both sides, for, if either party die before entry, the exchange is void, for want of sufficient notoriety. But if, after an exchange of lands, or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title; he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges.

9. **Partition.**—A partition is when two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part. Here, as in some instances, there is a unity of interest, and in all a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates which they are to take and enjoy separately. By the common law, coparceners being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common must have done it by deed: and in both cases the conveyance must have been perfected by livery of seisin. But the statute of frauds, 20 Car. II, c. 2, hath now abolished this distinction, and made a deed in all cases necessary.

These are the several species of primary or original conveyances. Those which remain are of the secondary or derivative sort, which presuppose some other conveyance precedent, and

only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance.

10. **Releases.**—These are a discharge or a conveyance of a man's right in lands or tenements, to another that hath some former estate in possession. The words generally used therein are "remised, released, and forever quit-claimed." And these releases may enure either, (1) By way of enlarging an estate, or *enlarger l'estate*: as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee. But in this case the relessee must be in possession of some estate, for the release to work upon; for if there be lessee for years, and before he enters and is in his possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the relessee. (2) By way of passing an estate, or *mitter l'estate:* as when one of two coparceners releaseth all her right to the other, this passeth the fee-simple of the whole. And in both these cases there must be a privity of estate between the relessor and relessee; that is, one of their estates must be so related to the other, as to make but one of the same estate in law. (3) By way of passing a right or *mitter le droit:* as if a man be disseised, and releaseth to his disseisor all his right, hereby the disseisor acquires a new right, which charges the quality of his estate, and renders that lawful which before was tortious or wrongful. (4) By way of extinguishment: as if my tenant for life makes a lease to A for life, remainder to B and his heirs, and I release to A; this extinguishes my right to the reversion, and shall enure to the advantage of B's remainder as well as of A's particular estate. (5) By way of entry and feoffment: as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee. And hereupon we may observe, that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land: for the

occupancy of the relessee is a matter of sufficient notoriety already.

11. **Confirmation.**—A confirmation is of a nature nearly allied to a release. Sir Edward Coke defines it to be a conveyance of an estate or right in esse, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased: and the words of making it are these, "have given, granted, ratified, approved and confirmed." An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term: here the lease for years is voidable by him in reversion; yet if he hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure. The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release, which operates by way of enlargement.

12. **Surrender.**—A surrender, *sursumredditio*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate descending upon the less, a surrender is the falling of a less estate into a greater. It is defined, a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words, "hath surrendered, granted, and yielded up." The surrenderor must be in possession; and the surrenderee must have a higher estate, in which the estate surrendered may merge; therefore tenant for life cannot surrender to him in remainder for years. In a surrender there is no occasion for livery of seisin; for there is a privity of estate between the surrenderor and the surrenderee; the one's particular estate and the other's remainder are one and the same estate: and livery having been once made at the creation of it, there is no necessity for having it afterwards. And, for the same reason, no livery is required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes: since the reversion of the relessor, or confirmor, and the particular estate of the relessee, or confirmee, are one and the same estate: and where there is already a possession, derived from such a privity of estate, any farther delivery of possession would be vain and nugatory.

13. **Assignment.**—An assignment is properly a transfer, or making over to another, of the right one has in any estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this: that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor.

14. **Defeazance.**—A defeazance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeazance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law; and therefore only indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth: though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent (as rents, of which no seisin could be had till the time of payment); and so also annuities, conditions, warranties, and the like, were always liable to be recalled by defeazances, made subsequent to the time of their creation.

15. **Conveyances operating under the statute of uses.**—There yet remain to be spoken of some few conveyances, which have their force and operation by virtue of the statute of uses. The only service (as will be later explained) to which this statute is now consigned, is in giving efficacy to some new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only ancient conveyance of corporeal freeholds; the security and notoriety of which public investiture abundantly overpaid the labor of going to the land, or of sending an attorney in one's stead. But this now has given way to deeds of conveyance operating under the statute.

Covenant to stand seised. A twelfth species of conveyance, called a covenant to stand seised to uses: by which a man, seised of lands, covenants in consideration of blood or marriage that he will stand seised of the same to the use of his child, wife or kinsman; for life, in tail, or in fee. Here the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land, without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate when made upon such weighty and interesting considerations as those of blood or marriage.

Bargain and sale. A thirteenth species of conveyance, introduced by this statute, is that of a bargain and sale of lands; which is a kind of real contract, whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey, the land to the bargainee, and becomes by such a bargain a trustee for, or seised to the use of, the bargainee: and then the statute of uses completes the purchase; or, as it hath been well expressed, the bargain first vests the use, and then the statute vests the possession. But as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old common law assurances were calculated to give; to prevent therefore clandestine conveyances of freeholds, it was enacted in the same session of parliament, by statute 27 Hen. VIII, c. 16, that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture, and enrolled within six months in one of the courts of Westminster hall, or with the *custos rotulorum* (keeper of the rolls) of the county. Clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious, till about six years before; which also occasioned them to be overlooked in framing the statute of uses: and therefore such bargains and sales are not directed to be enrolled. But how impossible it is to foresee, and provide against, all the consequences of innovations! This omission has given rise to

Lease and release. A fourteenth species of conveyance, viz.: by lease and release; first invented by Sergeant Moore, soon after the statute of uses, and now the most common of any, and therefore not to be shaken; though very great lawyers (as,

particularly, Mr. Noy, attorney-general to Charles I) have formerly doubted its validity. It is thus contrived: A lease, or rather bargain and sale, upon some pecuniary consideration, for one year, made by the tenant of the freehold, to the lessee or bargainee. Now this, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the use of the term for a year; and then the statute immediately annexes the possession. He therefore, being thus in possession, is capable of receiving a release of the freehold and reversion; which, we have seen before, must be made to a tenant in possession: and, accordingly, the next day, a release is granted to him. This is held to supply the place of livery of seisin: and so a conveyance by lease and release is said to amount to a feoffment.

16. **Deeds to declare or revoke uses.**—To these may be added deeds to lead or declare the uses of other more direct conveyances, as feoffments, fines, and recoveries; and deeds of revocation of uses, hinted at in a former page, and founded in a previous power, reserved at the raising of the uses, to revoke such as were then declared; and to appoint others in their stead, which is incident to the power of revocation. And this may suffice for a specimen of conveyances founded upon the statute of uses, and will finish our observations upon the varieties of conveyances which serve to transfer real property.

CHAPTER XXIV.

DEEDS: REQUISITES, FORMAL PARTS, EXECUTION AND CONSTRUCTION.

1. Indentures and deeds poll.—In treating of deeds I shall examine, first, what a deed is; secondly, its requisites; and, thirdly, how it may be avoided.

First, then, a deed is a writing sealed and delivered by the parties. It is sometimes called a charter, *carta,* from its materials; but most usually when applied to the transactions of private subjects, it is called a deed, in Latin *factum,* by way of pre-eminence, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be estopped by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles *instar dentium* (like teeth), like the teeth of a saw, but at present in a waving line) on the top or side, to tally or correspond with the other; which deed so made, is called an indenture. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such manner as to leave half the word on one part and half on the other. It seems at present to serve for little other purpose than to give name to the species of the deed. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are counterparts: though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only is not indented, but

polled or shaved quite even; and therefore called a deed-poll, or a single deed.

2. Requisites of deeds.—We are in the next place to consider the requisites of a deed.

Parties. The first of which, is, that there be persons able to contract and be contracted with for the purposes intended by the deed: and also a thing, or subject-matter to be contracted for; all which must be expressed by sufficient names. So as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised.

Consideration. Secondly, the deed must be founded upon good and lawful consideration. A deed made without any consideration was formerly of no effect: for it was construed to enure, or to be effectual, only to the use of the grantor himself. It is therefore customary to recite a consideration even in deeds of gift to rebut the implication of a resulting use. The consideration may be either a good or a valuable one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence and natural duty; a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant: and is therefore founded in motives of justice. Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favor of creditors, and bona fide purchasers.

Writing on paper or parchment. Thirdly; the deed must be written, or I presume printed, for it may be in any character or any language; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed. Wood or stone may be more durable, and linen less liable to erasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both these desirable qualities: for there is nothing else so durable, and at the same time so little liable to alteration: nothing so secure from alteration, that is at the same time so durable. Formerly many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the statute 29 Car. II, c. 3, enacts, that no lease estate or interest in lands, tenements, or hereditaments, made by livery of seisin, or by

parol only (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value), shall be looked upon as of greater force than a lease or estate at will; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid; unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorized in writing.

Words of conveyance. Fourthly; the matter written must be legally and orderly set forth: that is, there must be words sufficient to specify the agreement and bind the parties; which sufficiency must be left to the courts of law to determine. For it is not absolutely necessary in law to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefore I will here mention them in their usual order.

3. **Formal parts of a deed.**—The premises may be used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted. Next comes the habendum and tenendum (to have and to hold). The office of the habendum is properly to determine what estate or interest is granted by the deed: though this may be performed, and sometimes is performed, in the premises. In which case the habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. As if a grant be "to A and the heirs of his body," in the premises; habendum "to him and his heirs forever," or vice versa; here A has an estate-tail, and a fee-simple expectant thereon. But had it been in the premises "to him and his heirs," habendum "to him for life," the habendum would be utterly void; for an estate of inheritance is vested in him before the habendum comes, and shall not

afterwards be taken away or devested by it. The tenendum, "and to hold," is now of very little use, and is only kept in by custom. It was sometimes formerly used to signify the tenure by which the estate granted was to be holden, viz.: *"tenendum per servitium militare, in burgagio, in libero socagio"* (to hold by military service, in burgage, in free socage), etc. But, all these being now reduced to free and common socage, the tenure is never specified. Before the statute of quia emptores, 18 Edw. I, it was also sometimes used to denote the lord of whom the land should be holden; but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the tenendum hath been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden *de capitalibus dominis feodi* (of the chief lords of the fee): but as this expressed nothing more than the statute had already provided for, it gradually grew out of use.

Next follow the terms of stipulation, if any, upon which the grant is made; the first of which is the reddendum or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted, as "rendering therefor yearly the sum of ten shillings, or a peppercorn, or two days' ploughing, or the like." Under the pure feudal system, this render, *reditus*, return or rent, consisted in chivalry, principally of military services; in villeinage, of the most slavish offices; and in socage, it usually consists of money, though it may still consist of services or of any other certain profit. To make a reddendum good, if it be of anything newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed. But if it be of ancient services or the like, annexed to the land, then the reservation may be to the lord of the fee.

Conditions. Another of the terms upon which a grant may be made is a condition; which is a clause of contingency, on the happening of which the estate granted may be defeated: as "provided always, that if the mortgagor shall pay the mortgagee 500*l.* upon such a day, the whole estate granted shall determine;" and the like.

Warranty. Next may follow the clause of warranty; whereby the grantor doth, for himself and his heirs, warrant and secure

to the grantee the estate so granted. By the feudal constitution, if the vassal's title to enjoy the feud was disputed, he might vouch, or call the lord or donor to warrant or insure his gift; which, if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense. And so, by our ancient law, if before the statute of quia emptores a man enfeoffed another in fee, by the feudal verb *dedi*, to hold of himself and his heirs by certain services; the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered.

Covenants. After warranty usually follows covenants, or conventions, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something to the other. Thus the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like; the grantee may covenant to pay his rent, or keep the premises in repair, &c. If the covenantor covenants for himself and his heirs, it is then a covenant real, and descends upon the heirs; who are bound to perform it, provided they have assets by descent, but not otherwise; if he covenants also for his executors and administrators, his personal assets, as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty. It is also in some respects a less security, and therefore more beneficial to the grantor; who usually covenants only for the acts of himself and his ancestors, whereas a general warranty extends to all mankind. For which reasons the covenant has in modern practice totally superseded the other.

Conclusion. Lastly, comes the conclusion, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day and year before mentioned. Not but a deed is good, although it mention no date; or hath a false date; or even if it hath an impossible date, as the thirtieth of February: provided the real day of its being dated or given, that is delivered, can be proved.

4. Execution of deeds.—I proceed now to the execution of deeds, which includes those acts necessary to put the deed into effect, of which I mention first the reading of it to the grantor.

This is necessary wherever any of the grantors desire it; and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself; if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void: at least for so much as is misrecited; unless it be agreed by collusion that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party.

It is requisite next that the grantor or party whose deed it is should seal, and now in most cases, I apprehend, should sign it also. The use of seals as a mark of authenticity to letters and other instruments in writing, is extremely ancient.

Delivery. Another essential act in the execution of the deed is, that it be delivered by the party himself or his certain attorney, which therefore is also expressed in the attestation; "sealed and delivered." A deed takes effect only from this tradition or delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing, and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee: in which last case it is not delivered as a deed, but as an escrow; that is, as a scroll or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes.

Attestation. The last requisite to the validity of a deed is the attestation, or execution of it in the presence of witnesses: though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed.

5. **Rules for construing conveyances.**—We have now considered the several species of common assurances, whereby a title to lands and tenements may be transferred and conveyed from one man to another. But, before we conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been laid down by courts of justice, for the construction and exposition of them all. These are:

According to intent of maker. That the construction be favorable, and as near the minds and apparent intents of the parties, as the rules of law will admit. For the maxims of law

are, that *"verba intentioni debent inservire"* (words should be subservient to the intention); and *"benigne interpretamur chartas propter simplicitatem laicorum"* (we interpret deeds favorably on account of the ignorance of the laity). And therefore the construction must also be reasonable, and agreeable to common understanding.

Words taken in ordinary sense. That *quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est* (where there is no ambiguity in the words, they should be construed according to their obvious meaning): but that, where the intention is clear, too minute a stress be not laid on the strict and precise signification of *words: nam qui hæret in litera, hæret in cortice* (for he who confines himself to the letter, goes but half way). Therefore, by a grant of a remainder a reversion may well pass, and *e converso.* And another maxim of the law is, that *"mala grammatica non vitiat chartam"* (bad grammar does not vitiate a deed); neither false English nor bad Latin will destroy a deed. Which perhaps a classical critic may think to be no unnecessary caution.

The whole document considered. That the construction be made upon the entire deed, and not merely upon disjointed parts of it. *"Nam ex antecedentibus et consequentibus, fit optima interpretatio."* (For a deed is best interpreted by the bearing of all its parts.) And therefore that every part of it be (if possible) made to take effect: and no word but what may operate in some shape or other. *"Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat."* (For words should be understood with an effect that may tend more to strengthen than destroy the subject-matter.)

Most strongly against maker. That the deed be taken most strongly against him that is the agent or contractor, and in favor of the other party. *"Verba fortius accipiuntur contra proferentem."* As, if tenant in fee-simple grants to any one an estate for life, generally, it shall be construed an estate for the life of the grantee. For the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words: and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon

them. But here a distinction must be taken between an indenture and a deed-poll: for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, because the other party hath given his consent to every one of them. But in a deed-poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him. And, in general, this rule, being a rule of some strictness and rigor, is the last to be resorted to; and is never to be relied upon, but where all other rules of exposition fail.

Validity favored. That, if the words will bear two senses, one agreeable to, and another against law; that sense be preferred, which is most agreeable thereto. As if tenant in tail lets a lease to have and to hold during life generally, it shall be construed to be a lease for his own life only, for that stands with the law; and not for the life of the lessee, which is beyond his power to grant.

That in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received, and the latter rejected; wherein it differs from a will; for there, of two such repugnant clauses the latter shall stand. Which is owing to the different natures of the two instruments; for the first deed and the last will are always most available in law. Yet in both cases we should rather attempt to reconcile them.

That a devise be most favorably expounded, to pursue if possible the will of the devisor, who, for want of advice or learning, may have omitted the legal or proper phrases. And therefore many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus a fee may be conveyed without words of inheritance; and an estate-tail without words of procreation. By a will also an estate may pass by mere implication, without any express words to direct its course. As, where a man devises lands to his heir at law, after the death of his wife; here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication; for the intent of the testator is clearly to postpone the heir till after her death; and, if she does not take it, nobody else can. So, also, where a devise is of black-acre to A,

and of white-acre to B in tail, and if they both die without issue, then to C in fee; here A and B have cross remainders by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C's remainder over shall be postponed till the issue of both shall fail. But, to avoid confusion, no such cross remainders are allowed between more than two devisees: and, in general, where any implications are allowed, they must be such as are necessary (or at least highly probable) and not merely possible implications. And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation of uses, is construed in each with equal favor and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law.

Resume'. And thus we have taken a transient view of a very large and diffusive subject, the doctrine of common assurances: which concludes our observations on the title to things real, or the means by which they may be reciprocally lost and acquired [except that of title by devise and descent, which will next engage our attention, after which we will] consider the estates which may be had in land, with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connexions of the persons entitled to an interest in the same parcel or tract.

CHAPTER XXV.

TITLE BY SUCCESSION, TESTATE AND INTESTATE, TO REAL AND PERSONAL PROPERTY.

1. Foundation of title by succession at death.—There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favor, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him: or why the occupier of a particular field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him.

The most universal and effectual way of abandoning property, is by the death of the occupant: when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention ought also to cease as of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else if he had a right to dispose of his acquisitions one moment beyond his life,

he would also have a right to direct their disposal for a million of ages after him: which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for, then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed.

But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion. And farther, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be formed.

The right of inheritance, or descent to the children and relations of the deceased seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no natural, but merely a civil right. It is true, that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the

dearest and most tender affections. [See R. T. Ely, Property and Contract, Chap. XVII, The Regulation of Inheritance.]

Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They become therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And therefore, also, in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs; being immediately on the spot when he died. For, we find the old patriarch Abraham expressly declaring, that "since God had given him no seed, his steward Eliezer, one born in his house, was his heir."

While property continued only for life, testaments were useless and unknown: and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates, as the exigence of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by testament; that is, by written or oral instructions, properly witnessed and authenticated, according to the pleasure of the deceased, which we therefore emphatically style his will. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his movables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the Eighth; and then only of a certain portion: for it was not till after the restoration that the power of devising real property became so universal as at present.

Wills, therefore, and testaments, rights of inheritance and successions are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid; neither does anything

vary more than the right of inheritance under different national establishments. In England, particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state. In personal estates the father may succeed to his children; in landed property he never can be their immediate heir by any the remotest possibility: in general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance: in real estates males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice; while others so scrupulously adhere to the supposed intention of the dead, that, if a will of lands be attested by only two witnesses, instead of three, which the law requires, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles, as if, on the one hand, the son had by nature a right to succeed to his father's lands; or, as if, on the other hand, the owner was by nature entitled to direct the succession of his property after his own decease. Whereas, the law of nature suggests, that, on the death of the possessor, the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society. The positive law of society, which is with us the municipal law of England, directs it to vest in such person as the last proprietor shall, by will, attended with certain requisites, appoint; and, in defect of such appointment, to go to some particular person, who, from the result of certain local constitutions, appears to be the heir at law. Hence it follows, that, where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed; and, where the necessary requisites are ommitted,

the right of the heir is equally strong, and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites were observed.

2. Title to personal property by testament and administration.—[The law of succession to real and personal property was very different at the English common law, but has tended to become assimilated. I propose to consider them in one and the same chapter, considering first personal property which is most similar to the law of wills, descent, and distribution in modern American law, and lastly the devise and descent of real estates.]

With us in England, this power of bequeathing personal property is coeval with the first rudiments of the law: for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law.

3. Reasonable parts of wife and children.—But we are not to imagine that this power of bequeathing extended originally to all a man's personal estate. On the contrary, Glanvil will inform us, that by the common law, as it stood in the reign of Henry the Second, a man's goods were to be divided into three equal parts: of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal: or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso,* if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but, if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts; and the writ *de rationabili parte bonorum* (of the reasonable part, or share, of the goods) was given to recover them.

This continued to be the law of the land at the time of magna charta, which provides that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased; and, if nothing be owing to the crown, "*omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilibus partibus suis*" (let them resign all the chattels to the will of the deceased; reserving to his wife

and children their reasonable shares). In the reign of King Edward the Third, this right of the wife and children was still held to be the universal or common law; though frequently pleaded as the local custom of Berks, Devon, and other countries: and Sir Henry Finch lays it down expressly, in the reign of Charles the First, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now, by will, bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration began.

4. History of administration and intestate succession.—In case a person made no disposition of such of his goods as were testable, whether that were only a part or the whole of them, he was, and is, said to die intestate; and in such cases it is said, that by the old law the king was entitled to seize upon his goods, as the *parens patriæ* (parent of the country), and general trustee of the kingdom. This prerogative the king continued to exercise for some time by his own ministers of justice; and probably in the county court where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron, and other courts, or to have their wills there proved, in case they made any disposition. Afterwards, the crown, in favor of the church, invested the prelates with this branch of the prerogative; which was done, saith Perkins, because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods, therefore, of intestates were given to the ordinary by the crown; and he might seize them, and keep them without wasting, and also might give, aliene, or sell them at his will, and dispose of the money *in pios usus* (to pious uses); and, if he did otherwise, he broke the confidence which the law reposed in him. So that, properly, the whole interest and power which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious. And, as he had thus the disposition of

intestates' effects, the probate of wills of course followed: for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

Abuse of trust by the bishops. The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were, therefore, not accountable to any, but to God and themselves, for their conduct. Thus, the popish clergy took to themselves (under the name of the church and poor) the whole residue of the deceased's estate; after the *partes rationabiles,* or two-thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reason it was enacted by the statute of Westm. 2, that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will: a use more truly pious, than any requiem, or mass for his soul. This was the first check given to that exorbitant power, with which the law had entrusted the ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands; yet the residuum, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve.

Administration granted to next of kin. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependants: and therefore the statute 31 Edw. III, c. 11, provides, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the next and most lawful friend of the intestate; who is interpreted to be the next of blood that is under no legal disabilities. The statute 21 Hen. VIII, c. 5, enlarges a little more the power of the ec-

clesiastical judge; and permits him to grant administration either to the widow, or the next of kin, or to both of them, at his own discretion; and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

5. Executors and administrators.—We are next to consider, what is an executor, and what an administrator; and how they are both to be appointed.

An executor is he to whom another man commits by will the execution of that his last will and testament. And all persons are capable of being executors, that are capable of making wills, and many others besides; as feme-coverts and infants; nay, even infants unborn, or *in ventre sa mere,* may be made executors. But no infant can act as such till the age of seventeen years; till which time administration must be granted to some other, *durante minore ætate* (during minority). In like manner as it may be granted *durante absentia* (during absence), or *pendente lite* (pending a suit); when the executor is out of the realm, or when a suit is commenced in the ecclesiastical court touching the validity of the will. But if the testator makes an incomplete will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act: in any of these cases the ordinary must grant administration *cum testamento annexo* (with the will anexed) to some other person; and then the duty of the administrator, as also when he is constituted only *durante minore ætate, &c.,* of another, is very little different from that of an executor. And this was law so early as the reign of Henry II; when Glanvil informs us, that "those should be executors of a will whom the testator shall have chosen, and to whom he himself shall have committed the trust; but if the testator shall not have named any, the relations of the deceased may take this duty upon themselves."

Administrators. But if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the Third and Henry the Eighth, before mentioned, direct. In consequence of which we may observe:

(1) *Who shall be appointed*: That the ordinary is compellable to grant administration of the goods and chattels of the

wife, to the husband, or his representatives: and of the husband's effects, to the widow, or next of kin; but he may grant it to either, or both, at his discretion: (2) That, among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases: (3) That this nearness or propinquity of degree shall be reckoned according to the computation of the civilians; and not of the canonists, which the law of England adopts in the descent of real estates: because in the civil computation, the intestate himself is the *terminus, a quo* (the limit from which) the several degrees are numbered; and not the common ancestor, according to the rule of the canonists.

And, therefore, in the first place the children, or (on failure of children) the parents of the deceased, are entitled to the administration; both which are indeed in the first degree; but with us the children are allowed the preference. Then follow brothers, grandfathers, uncles or nephews, (and the females of each class respectively,) and lastly, cousins: (4) The half-blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate, and only excluded from inheritances of land upon feudal reasons. Therefore, the brother of the half-blood shall exclude the uncle of the whole blood: and the ordinary may grant administration to the sister of the half, or the brother of the whole-blood, at his own discretion: (5) If none of the kindred will take out administration, a creditor may, by custom, do it: (6) If the executor refuses, or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin: (7) And, lastly, the ordinary may, in defect of all these, commit administration (as he might have done before the statute of Edward III), to such discreet person as he approves of; or may grant him letters *ad colligendum bona defuncti* (for collecting the goods of the deceased), which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody, and to do other acts for the benefit of such as are entitled to the property of the deceased.

Their duties. Having thus shown what is, and who may be, an executor or administrator, I proceed now, lastly, to inquire into some few of the principal points of their office and duty. These in general are very much the same in both executors and

administrators; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs little from an executor; and, secondly, that an executor may do many acts before he proves the will, but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will and not from the probate, the latter owes his entirely to the appointment of the ordinary.

6. **Executors de son tort.**—If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased, and many other transactions), he is called in law an executor of his own wrong (*de son tort*), and is liable to all the trouble of an executorship, without any of the profits or advantages: but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling as will charge a man as executor of his own wrong. Such a one cannot bring an action himself in right of the deceased, but actions may be brought against him. And in all actions by creditors against such an officious intruder, he shall be named an executor, generally; for the most obvious conclusion which strangers can form from his conduct is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof. He is chargeable with the debts of the deceased, so far as assets come to his hands; and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree, himself only excepted. And though, as against the right executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages; unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt. But let us now see what are the power and duty of a rightful executor or administrator.

7. **Powers and duties of executors and administrators.**—He must bury the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of devestation or waste of the substance of the deceased, and shall only be preju-

dicial to himself, and not to the creditors and legatees of the deceased.

Probate of will. The executor, or the administrator *durante minore ætate,* or *durante absentia,* or *cum testamento annexo,* must prove the will of the deceased: Which is done either in common form, which is only on his own oath before the ordinary, or his surrogate; or *per testes* (by witnesses), in more solemn form of law, in case the validity of the will be disputed. When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of its having been proved before him: all which together is usually styled the probate.

Letters of administration. In defect of any will the person entitled to be administrator must also, at this period, take out letters of administration under the seal of the ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by statute 22 and 23 Car. II, c. 10, enter into a bond with sureties, faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration, granted by him, are the only proper ones: but if the deceased had *bona notabilia,* or chattels to the value of a hundred shillings, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out before the metropolitan of the province, by way of special prerogative: whence the courts where the validity of such wills is tried, and the offices where they are registered, are called the prerogative courts, and the prerogative offices, of the provinces of Canterbury and York.

The inventory. The executor or administrator is to make an inventory of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

Collecting assets. He is to collect all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law: being the representative of the deceased, and having the same property in his goods as the principal had when living, and the same remedies to recover

them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest. Whatever is so recovered, that is of a salable nature and may be converted into ready money, is called assets in the hands of the executor or administrator; that is sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him: which is the next thing to be considered: for,

Paying debts. The executor or administrator must pay the debts of the deceased. In payment of debts he must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the king on record or specialty. Thirdly, such debts as are by particular statutes to be preferred to all others: Fourthly, debts of record; as judgments, statutes, and recognizances. Fifthly, debts due on special contracts; as for rent (for which the lessor has often a better remedy in his own hands by distraining), or upon bonds covenants, and the like, under seal. Lastly, debts on simple contracts, viz.: upon notes unsealed and verbal promises.

Among these simple contracts, servants' wages are by some with reason preferred to any other: and so stood the ancient law, according to Bracton and Fleta, who reckon among the first debts to be paid, *servitia servientium et stipendia famulorum* (the services of attendants and the wages of servants). Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to. But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of his own wrong, which is contrary to the rule of law. If a creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or not; provided there be assets sufficient to pay the testator's debts; for though this discharge of the debt shall take place of all legacies, yet it

were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary. Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest: for, without a suit commenced, the executor has no legal notice of the debt.

Legacies. When the debts are all discharged, the legacies claim the next regard; which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of debts.

A legacy is a bequest, or gift, of goods and chattels by testament: and the person to whom it was given is styled the legatee: which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papists, and some others. This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor: for if I have a general or pecuniary legacy of 100*l.*, or a specific one of a piece of plate, I cannot in either case take it without the consent of the executor. For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just, before he is permitted to be generous; or, as Bracton expresses the sense of our ancient law, "from the effects of the deceased are to be answered, first, the demands of necessity: afterwards, what expediency requires; and lastly, the requisitions of bequest." And in case of a deficiency of assets, all the general legacies must abate proportionately, in order to pay the debts; but a specific legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow anything by way of abatement, unless there be not sufficient without it. Upon the same principle, if the legatees had been paid their legacies, they are afterwards bound to refund a ratable part, in case debts come in, more than sufficient to exhaust the residuum after the legacies are paid. And this law is as old as Bracton and Fleta, who tell us, "if there should be more due, or more legacies bequeathed, than the chattels of the deceased are sufficient to satisfy, let an equal abatement be made on all the legacies, the privilege of the king being excepted."

If the legatee dies before the testator, the legacy is a lost or

lapsed legacy and shall sink into the residuum. And if a contingent legacy be left to any one, as when he attains, or if he attains, the age of twenty-one, and he dies before that time, it is a lapsed legacy. But a legacy to one, to be paid when he attains the age of twenty-one years, is a vested legacy; an interest which commences *in præsenti,* although it be *solvendum in futuro* (to be paid at a future period); and if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate at the same time that it would have become payable, in case the legatee had lived. This distinction is borrowed from the civil law; and its adoption in our courts is not so much owing to its intrinsic equity, as to its having been before adopted by the ecclesiastical courts. For, since the chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in their determinations; and that the subject should have the same measure of justice in whatever court he sued. But, if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir, for, with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction. And in case of a vested legacy, due immediately, and charged on land or money in the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator.

The residuum. When all the debts and particular legacies are discharged, the surplus or residuum must be paid to the residuary legatee, if any be appointed by the will; and if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship. But whatever ground there might have been formerly for this opinion, it seems now to be understood with this restriction, that although where the executor has no legacy at all, the residuum shall in general be his own, yet wherever there is sufficient on the face of a will (by means of a competent legacy or otherwise), to imply that the testator intended his executor should not have the residue, the undevised surplus of the estate shall go to the next of kin, the executor then standing upon exactly the same footing as an administrator, concerning whom, indeed, there

formerly was much debate, whether or no he could be compelled to make any distribution of the intestate's estate. For, though (after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased) the spiritual court endeavored to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law. And the right of the husband not only to administer, but also to enjoy exclusively, the effects of his deceased wife, depends still on this doctrine of the common law: the statute of frauds declaring only, that the statute of distributions does not extend to this case.

8. **Statute of distributions.**—But now these controversies are quite at an end: for, by the statute 22 and 23 Car. II, c. 10, explained by 29 Ch. II, c. 30, it is enacted that the surplusage of intestates' estates (except of femes-covert, which are left as at common law), shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: One-third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if dead, to their representatives; that is, their lineal descendants: if there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are admitted, among collaterals, farther than the children of the intestate's brothers and sisters. The next of kindred, here referred to, are to be investigated by the same rules of consanguinity, as those who are entitled to letters of administration; of whom we have sufficiently spoken. And therefore by this statute the mother as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue; in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II, c. 17, if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions.

Analogies of the statute. It is obvious to observe, how near a resemblance this statute of distributions bears to our ancient English law, *de rationabili parte bonorum;* which Sir Edward Coke himself, though he doubted the generality of its restraint on the power of devising by will, held to be universally binding (in point of conscience at least) upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of succession ab intestato, which, and because the act was also penned by an eminent civilian, has occasioned a notion that the parliament of England copied it from the Roman prætor: though, indeed, it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom from the time of King Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe.

Advancements. So, likewise, there is another part of the statute of distributions, where directions are given that no child of the intestate (except his heir-at-law) on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but, if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision hath been also said to be derived from the *collatio bonorum* (equalizing the estates or goods) of the imperial law: which it certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe, that with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and of our sister kingdom of Scotland; and, with regard to lands descending in coparcenary, that it hath always been, and still is, the common law of England, under the name of hotchpot.

Right of representation. Before I quit this subject I must, however, acknowledge that the doctrine and limits of representation laid down in the statute of distributions, seem to have been principally borrowed from the civil law: whereby it will sometimes happen, that personal estates are divided per capita, and sometimes per stirpes; whereas the common law knows no other

rule of succession but that per stirpes only. They are divided per capita to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure representationis,* in the right of another person. As, if the next of kin be the intestate's three brothers, A, B and C; here his effects are divided into three equal portions, and distributed per capita, one to each; but if one of these brothers, A, had been dead leaving three children, another, B, leaving two; then the distribution must have been per stirpes: viz.: one-third to A's three children, another third to B's two children, and the remaining third to C, the surviving brother; yet if C had also been dead, without issue, then A's and B's five children, being all in equal degree to the intestate, would take in their own rights per capita, viz.: each of them one-fifth part.

9. **Nature and sorts of wills.**—[A will may be defined as the nomination by a testator of successors who shall take his property after his death instead of his relatives or those successors appointed by law. This appointment of successors must be made with all due solemnities and forms of law.]

These testaments are divided into two sorts: written and verbal or nuncupative; of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the testator in extremis before a sufficient number of witnesses, and afterwards reduced to writing. A codicil, *codicillus,* a little book or writing, is a supplement to a will, or an addition made by the testator and annexed to, and to be taken as part of, a testament; being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator. This may also be either written or nuncupative.

10. **Nuncupative wills.**—But, as nuncupative wills and codicils (which were formerly more in use than at present, when the art of writing is become more universal) are liable to great impositions, and may occasion many perjuries, the statute of frauds, 29 Car. II, c. 3, hath laid them under many restrictions; except when made by mariners at sea, and soldiers in actual service. As to all other persons, it enacts: (1) That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to writing, and read over to him, and approved; and unless the

same be proved to have been so done by the oaths of three witnesses at the least; who, by statute 4 and 5 Ann. c. 16, must be such as are admissible upon trials at common law. (2) That no nuncupative will shall in anywise be good, where the estate bequeathed exceeds 30*l.*, unless proved by three such witnesses, present at the making thereof (the Roman law requiring seven), and unless they or some of them were specially required to bear witness thereto by the testator himself; and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he be surprised with sickness on a journey, or from home, and dies without returning to his dwelling. (3) That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor shall it be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow or next of kin, to contest it, if they think proper.

Thus hath the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse; and is hardly ever heard of, but in the only instance where favor ought to be shown to it, when the testator is surprised by sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, not any loose, idle discourse in his illness; for he must require the bystanders to bear witness of such his intention; the will must be made at home, or among his family or friends, unless by unavoidable accident; to prevent impositions from strangers: it must be in his last sickness; for, if he recovers he may alter his dispositions, and has time to make a written will: it must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience, or surprised.

11. Formalities of execution of testaments of chattels.— As to written wills, they need not any witness of their publication. I speak not here of devises of lands, which are quite of a different nature; being conveyances by statute, unknown to the feudal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels written in the testator's own hand, though it has neither his name nor seal to

it, nor witnesses present at its publication, was good; provided sufficient proof could be had that it is his handwriting. And though written in another man's hand, and never signed by the testator, yet, if proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate. Yet [modern statutes require that] it be signed or sealed by the testator, and published in the presence of witnesses: which last was always required in the time of Bracton; or, rather, he in this respect has implicitly copied the rule of the civil law.

12. Wills—How avoided.—No testament is of any effect till after the death of the testator, and the will is revocable until his death. And therefore, if there be many testaments, the last overthrows all the former: but the republication of a former will revokes one of a later date, and establishes the first again. Hence it follows, that testaments may be avoided three ways: (1) If made by a person laboring under any of the incapacities to be mentioned: (2) by making another testament of a later date: and (3) by cancelling or revoking it. For, though I make a last will and testament irrevocable in the strongest words, yet I am at liberty to revoke it: because my own act or words cannot alter the disposition of law, so as to make that irrevocable which is in its own nature revocable. For this, saith Lord Bacon, would be for a man to deprive himself of that, which of all other things is most incident to human condition; and that is, alteration or repentance. It hath also been held, that, without an express revocation, if a man, who hath made his will, afterwards marries and hath a child, this is a presumptive or implied revocation of his former will, which he made in a state of celibacy. The Romans were also wont to set aside testaments as being *inofficiosa,* deficient in natural duty, if they disinherited or totally passed by (without assigning a true and sufficient reason) any of the children of the testator. But, if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed; but was then supposed to have acted thus for some substantial cause; and in such case no *querela inofficiosi testamenti* (complaint of an unkind will) was allowed. Hence probably hath arisen that groundless vulgar error, of the necessity of leaving the heir a shilling, or some other express legacy, in order to dis-

inherit him effectually: whereas the law of England makes no such constrained suppositions of forgetfulness or insanity; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosi*, to set aside such a testament.

13. Incapacity to make a will.—I proceed now to inquire who may, or may not, make a testament; or what persons are absolutely obliged by law to die intestate. And this law is entirely prohibitory; for, regularly, every person hath full power and liberty to make a will, that is not under some special prohibition by law or custom; which prohibitions are principally upon three accounts; for want of sufficient discretion; for want of sufficient liberty and free will; and on account of their criminal conduct.

Infants. In the first species are to be reckoned infants, under the age of fourteen if males, and twelve if females; which is the rule of the civil law. For, though some of our common lawyers have held that an infant of any age (even four years old) might make a testament, and others have denied that under eighteen he is capable, yet, as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. So that no objection can be admitted to the will of an infant of fourteen, merely for want of age; but if the testator was not of sufficient discretion, whether at the age of fourteen or four-and-twenty, that will overthrow his testament.

Madmen, or otherwise non compotes (not in their right senses), idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their senses besotted with drunkenness; all these are incapable, by reason of mental disability, to make any will so long as such disability lasts.

Married women. And, with regard to feme-coverts, our law differs still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a feme-sole. But with us a married woman is not only utterly incapable of devising lands, being excepted out of the statute of wills, 34 and 35 Hen. VIII, c. 5, but also she is incapable of making a testament of chattels, without the license of her husband. For all her personal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to himself if he survives her: it would be therefore extremely

inconsistent, to give her a power of defeating that provision of the law, by bequeathing those chattels to another. Yet by her husband's license she may make a testament; and the husband, upon marriage, frequently covenants with her friends to allow her that license; but such license is more properly his assent; for, unless it be given to the particular will in question it will not be a complete testament, even though the husband beforehand hath given her permission to make a will. Yet it shall be sufficient to repel the husband from his general right of administering his wife's effects; and administration shall be granted to her appointee, with such testamentary paper annexed. So that, in reality, the woman makes no will at all, but only something like a will; operating in the nature of an appointment, the execution of which the husband, by his bond, agreement, or covenant, is bound to allow. A distinction similar to which we meet with in the civil law. For though a son who was *in potestate parentis* (in the power of the parent) could not by any means make a formal and legal testament, even though his father permitted it, yet he might, with the like permission of his father, make what was called a *donatio mortis causa* (a donation depending on the event of the death of the donor).

14. Restraints on the power of devising land.—It seems sufficiently clear, that, before the conquest, lands were devisable by will. But upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord. And some have questioned whether this restraint (which we may trace even from the ancient Germans) was not founded upon truer principles of policy, than the present power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neighbors; since it rarely happens, that the same man is heir to many others, though by art and management he may frequently become their devisee. Thus the ancient law of the Athenians directed that the estate of the deceased should always descend to his children; or, on failure of lineal descendants, should go to the collateral relations: which had an admirable effect in keeping up equality, and preventing

the accumulation of estates. But when Solon made a slight alteration, by permitting them (though only on failure of issue) to dispose of their lands by testament, and devise away estates from the collateral heir, this soon produced an excess of wealth in some, and of poverty in others: which by a natural progression, first produced popular tumults and dissensions; and these at length ended in tyranny, and the utter extinction of liberty: which was quickly followed by a total subversion of their state and nation.

On the other hand, it would now seem hard, on account of some abuses (which are the natural consequences of free agency, when coupled with human infirmity), to debar the owner of lands from distributing them after his death as the exigence of his family affairs, or the justice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar propriety; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property; which is the natural consequence of our doctrine of succession by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feudal times: but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

Possible reasons for early restraints. However this be, we find that, by the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament; except only in Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted. And though the feudal restraint on alienations by deed vanished very early, yet this on wills continued for some centuries after: from an apprehension of infirmity and imposition on the testator *in extremis* (in his last moments), which made such devises suspicious. Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descents is apparent to the neighborhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

15. Power to devise gained first by uses and then by statute of wills.—But when ecclesiastical ingenuity had invented the

doctrine of uses as a thing distinct from the land, uses began to be devised very frequently, and the devisee of the use could in chancery compel its execution. For it is observed by Gilbert, that, as the popish clergy then generally sat in the court of chancery, they considered that men are most liberal when they can enjoy their possessions no longer: and therefore at their death would choose to dispose of them to those who, according to the superstition of the times, could intercede for their happiness in another world. But, when the statute of uses had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable: which might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, viz.: 32 Hen. VIII, c. 1, explained by 34 Hen. VIII, c. 5, which enacted that all persons being seised in fee-simple (except feme-coverts, infants, idiots, and persons of non-sane memory) might by will and testament in writing devise to any other person, except to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage: which now, through the alteration of tenures by the statute of Charles the Second, amounts to the whole of their landed property, except their copyhold tenements.

With regard to devises in general, experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the hand-writing of another person were allowed to be good wills within the statute.

16. **Formalities required in executing wills of lands.**—To remedy which, the statute of frauds and perjuries, 29 Car. II, c. 3, directs, that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses. And a solemnity nearly similar is requisite for revoking a devise by writing; though the same may be also revoked by burning,

cancelling, tearing, or obliterating thereof by the devisor, or in his presence and with his consent: as likewise impliedly, by such a great and entire alteration in the circumstances and situation of the devisor, as arises from marriage and the birth of a child. In the construction of this last statute, it has been adjudged that the testator's name, written with his own hand, at the beginning of his will, as, "I, John Mills, do make this my last will and testament;" is a sufficient signing, without any name at the bottom; though the other is the safer way. It has also been determined, that though witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times. But they must all subscribe their names as witnesses in his presence, lest by any possibility they should mistake the instrument.

17. **Competency of witnesses.**—And, in one case determined by the court of king's bench, the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses: for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney, whose very attendance made them creditors, or by the minister of the parish, who had any demand for tithes or ecclesiastical dues (and these are the persons most likely to be present in the testator's last illness), and if in such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II, c. 6, which restored both the competency and the credit of such legatees, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of creditors, by directing the testimony of all such creditors to be admitted, but

leaving their credit (like that of all other witnesses) to be considered, on a view of all the circumstances, by the court and jury before whom such will shall be contested. And in a much later case the testimony of three witnesses, who were creditors was held to be sufficiently credible, though the land was charged with the payment of debts; and the reasons given on the former determination were said to be insufficient.

Another inconvenience was found to attend this new method of conveyance by devise; in that creditors by bond and other specialties, which affected the heir provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the devisee of their debtor. To obviate which, the statute 3 and 4 W. and M. c. 14, hath provided, that all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple or having power to dispose by will, shall (as against such creditors only), be deemed to be fraudulent and void: and that such creditors may maintain their actions jointly against both the heir and the devisee.

18. **Nature of a will as a conveyance.**—A will of lands, made by the permission and under the control of these statutes, is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject: with this difference, that in other conveyances the actual subscription of the witnesses is not required by law, though it is prudent for them so to do, in order to assist their memory when living, and to supply their evidence when dead; but in devises of lands such subscription is now absolutely necessary by statute, in order to identify a conveyance, which in its nature can never be set up till after the death of the devisor. And upon this notion, that a devise affecting lands is merely a species of conveyance, is founded this distinction between such devises and testaments of personal chattels; that the latter will operate upon whatever the testator dies possessed of, the former only upon such real estates as were his at the time of executing and publishing his will. Wherefore no after-purchased lands will pass under such devise, unless, subsequent to the purchase or contract, the devisor republishes his will. [This doctrine is now generally changed by statute.]

19. Title by descent.—Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate, so descending to the heir, is in law called the inheritance.

The doctrine of descents, or law of inheritance in fee-simple, is a point of the highest importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive that this is an estate confined in its descent to such heirs only of the donee, as have sprung or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heirs; this is a point that we must result back to the standing law of descents in fee-simple to be informed of. Descents by statute, or fees-tail *per formam doni,* in pursuance of the statute of Westminster the second, will be later considered, and it will be seen that the descent in tail is restrained and regulated according to the words of the original donation, and does not entirely pursue the common law doctrine of inheritance; which, and which only, it will now be our business to explain. And, as this depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary to state, as briefly as possible, the true notion of this kindred or alliance in blood.

20. Consanguinity, or kindred.—This is defined by the writers on these subjects to be *vinculum personarum ab eodem stipite descendentium* (the connexion or relation of persons descended from the same stock or common ancestor). This consanguinity is either lineal, or collateral.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between

John Stiles (the *propositus* in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil, and canon, as in the common law.

The doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees; and so many different bloods is a man said to contain in his veins, as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers; and by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate.

Collateral kindred answer to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock of ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such, then, as lineally spring from one and the same ancestor, who is the stirps, or root, the stipes, trunk, or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos* (relations).

We must be careful to remember, that the very being of collat-

eral consanguinity consists in this descent from one and the same common ancestor. Thus Titius and his brother are related; why? because both are derived from one father; Titius and his first cousin are related; why? because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they both are derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived.

Degrees by canon law rules. The method of computing these degrees in the canon law, which our law has adopted, is as follows: we begin at the common ancestor, and reckon downwards: and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus Titius and his brother are related in the first degree; for from the father to each of them is counted only one; Titius and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; viz.: his own grandfather, the father of Titius.

21. Common law rules of descent.—The nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules or canons of inheritance, according to which, estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.

(1) The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised in infinitum; but shall never lineally ascend. To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. We must also remember, that no person can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of a freehold: or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal;

such as the receipt of rent, a presentation to the church in case of an advowson, and the like. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seised.

Kinsmen in ascending line do not inherit. When therefore a person dies so seised, the inheritance first goes to his issue; as if there be Geoffrey, John, and Matthew, grandfather, father, and son; and John purchases lands and dies; his son Matthew shall succeed him as heir, and not the grandfather, Geoffrey; to whom the land shall never ascend, but shall rather escheat to the lord. This total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original. For, by the Jewish law, on failure of issue, the father succeeded to the son, in exclusion of brethren, unless one of them married the widow, and raised up seed to his brother. And by the laws of Rome, in the first place, the children or lineal descendants were preferred; and on failure of these, the father and mother or lineal ascendants succeeded, together with the brethren and sisters; though by the law of the twelve tables the mother was originally, on account of her sex, excluded. Hence this rule of our laws has been censured and declaimed against as absurd, and derogating from the maxims of equity and natural justice.

(1) We are to reflect, however, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi* (of positive law) merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor: after which the land by the law of nature would again become common, and liable to be seised by the next occupant; but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by possession is continued and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly, therefore, no injustice done to individuals, whatever be the path of descent marked out by the municipal law.

(2) Males preferred before females. A second general rule or canon is, that the male issue shall be admitted before the female.

Thus, sons shall be admitted before daughters; or, as our male law-givers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred. As if John Styles hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession in preference to both the daughters.

(3) Primogeniture. A third rule or canon of descent is this: that where there are two or more males, in equal degree, the eldest only shall inherit; but the females all together. As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters; but, if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners.

(4) Succession in stirpes. A fourth rule, or canon of descents is this; that the lineal descendants *in infinitum,* of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

Thus the child, grandchild, or great-grandchild (either male or female) of the eldest son succeeds before the younger son, and so *in infinitum* (for ever). And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies without other issue; these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary: so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte the surviving sister shall have six, and her six nieces, the daughters of Margaret, one apiece. This taking by representation is called succession in stirpes, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done.

(5) Collateral descent. A fifth rule is, that on failure of lineal descendants, or issue, of the person last seised, the inheritance

shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

Thus, if Geoffrey Stiles purchases land, and it descends to John Stiles, his son, and John dies seised thereof, without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family. The first purchaser, *perquisitor,* is he who first acquired the estate to his family, whether same was transferred to him by sale or by gift, or by any other method, except only that of descent.

This is a rule almost peculiar to our own laws, and those of a similar original. For it was entirely unknown among the Jews, Greeks, and Romans: none of whose laws looked any farther than the person himself who died seised of the estate; but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it.

The rules of inheritance that remain are only rules of evidence, calculated to investigate who the purchasing ancestor was; which *in feudis vere antiquis* (in fees really ancient) has in process of time been forgotten, and is supposed so to be in feuds that are held *ut antiquis.*

(6) A sixth rule or canon therefore is, that the collateral heir of the person last seized must be his next collateral kinsman of the whole blood.

Who are not collaterals. First, he must be his next collateral kinsman, either personally or *jure representationis* (by right of representation); which proximity is reckoned according to the canonical degrees of consanguinity before mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. So also, if the father has two sons, A and B, by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seised without issue; still B shall not be heir to this estate, because he is only of the half blood to A, the person last seised; but it shall descend to a sister (if any) of the whole blood to A: for in such cases the maxim is, that the seisin or *possessio fratis facit sororem esse hæredum* (the seisin of the brother makes the sister heir). Yet had A died without

entry, then B might have inherited; not as heir to A, his half-brother, but as heir to their common father, who was the person last actually seised. This total exclusion of the half-blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded.

(7) The seventh and last rule or canon is, that in collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near)—unless where the lands have, in fact, descended from a female. Thus the relations on the father's side are admitted *in infinitum,* before those on the mother's side are admitted at all; and the relations of the father's father, before those of the father's mother; and so on.

22. Incapacity to take by descent; bastards and aliens.—Bastards are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination. Such are held to be *nullius filii,* the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur* (those who are the offspring of an illicit connexion are not reckoned as children). Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchaser: and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord. The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father: and also if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance; and a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not. But our law, in favor of marriage, is much less indulgent to bastards. As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For as all collateral kindred consists in being derived from the same common ances-

tor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And therefore if a bastard purchases land and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee.

Aliens, also are incapable of taking by descent, or inheriting: for they are not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, then upon reasons strictly feudal. Though, if lands had been suffered to fall into their hands who owe no allegiance to the crown of England, the design of introducing our feuds, the defence of the kingdom, would have been defeated. Wherefore, if a man leaves no other relations but aliens, his land shall escheat to the lord.

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase, they are under still greater disabilities. And, as they can neither hold by purchase, nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit; but so it is expressly holden, because they have not in them any inheritable blood.

23. Husband and wife as successors.—We shall now consider the rights of succession to land between husband or wife on the death of the other spouse. Tenant by the curtesy of England, is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail; and has by her issue, born alive, which was capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England. As soon, therefore, as any child was born, the father began to have a permanent interest in the lands; he became one of the *pares curtis* (peers of the court), did homage to the lord, and was called tenant by the curtesy *initiate;* and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant.

There are four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife. (1) The marriage must be canonical and legal. (2) The seisin of the wife must be an actual seisin, or possession of the

lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the curtesy of a remainder or reversion. (3) The issue must be born alive. Some have had a notion that it must be heard to cry; but that is a mistake. Crying indeed is the strongest evidence of its being born alive; but it is not the only evidence. The issue also must be born during the life of the mother; for if the mother dies in labor, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the curtesy; because at the instant of the mother's death he was clearly not entitled, as having had no issue born, but the land descended to the child while he was yet in his mother's womb; and the estate being once so vested, shall not afterwards be taken from him. In general there must be issue born: and such issue as is also capable of inheriting the mother's estate. Therefore, if a woman be tenant in tail male, and hath only a daughter born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male. And this seems to be the principal reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised; because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir to the ancestor of any land whereof the ancestor was not actually seised: and therefore, as the husband hath never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy. And hence we may observe, with how much nicety and consideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture: for, whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy. The husband by the birth of the child becomes (as was before observed) tenant by the curtesy initiate and may do many acts to charge the lands; but his estate is not consummate till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy.

24. Dower.—Tenant in dower is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life.

Dower is called in Latin by the foreign jurists *doarium,* but by Bracton and our English writers *dos:* which among the Romans signified the marriage portion which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance: nor indeed is there anything in general more different, than the regulation of landed property according to the English and Roman laws. Dower out of lands seems also to have been unknown. However this be, the reason which our law gives for adopting it, is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children.

In treating of this estate, let us, first, consider who may be endowed; secondly, of what she may be endowed; thirdly, how dower may be barred or prevented.

(1) Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii,* she shall not be endowed; for *ubi nullum matrimonium ibi nulla dos* (where there is no marriage there is no dower due). But a divorce *a mensa et thoro* (from bed and board) only, does not destroy the dower; no, not even for adultery itself by the common law. Yet now by the statute Westm. 2, if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her.

(2) Of what endowed. We are next to inquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was seised in fee-simple or fee-tail, at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir.

25. Jointure and how dower may be barred or prevented.—A widow may be barred of her dower not only by elopement, divorce, being an alien, the treason of her husband, and other

disabilities before mentioned, but also by detaining the title deeds or evidences of the estate from the heir, until she restores them: and, by the statute of Gloucester, if a dowager alienes the land assigned her for dower, she forfeits it *ipso facto*, and the heir may recover it by action. A woman also may be barred of her dower, by levying a fine, or suffering a recovery of the lands, during her coverture. [Also by joining her husband in a deed of conveyance of the land to another.]

A jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by Sir Edward Coke; "a competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least." This description is framed from the purview of the statute 27 Henry VIII, c. 10, before mentioned; commonly called the statute of uses, of which we shall speak fully hereafter. At present I have only to observe, that before the making of that statute, the greatest part of the land of England was conveyed to uses; the property or possession of the soil being vested in one man, and the use, or profits thereof, in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the use of lands in absolute fee-simple, yet the wife was not entitled to any dower therein; he not being seised thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint tenancy, or jointure; which settlement would be a provision for the wife in case she survived her husband.

At length the statute of uses ordained, that such as had the use of lands should, to all intents and purposes, be reputed and taken to be absolutely seised and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure: had not the same statute provided, that upon making such an estate in jointure to the wife before marriage, she shall be forever precluded from her dower.

Essentials. But then these four requisites must be punctually observed: (1) The jointure must take effect immediately on the death of the husband. (2) It must be for her own life at least, and not *pur auter vie,* or for any term of years or other smaller estate. (3) It must be made to herself, and no other in trust for her. (4) It must be made, and so in the deed particularly expressed to be, in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her after marriage, she has her election after her husband's death, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture.

A widow may enter at once, without any formal process, on her jointure land; as she also might have done on dower *ad ostium ecclesiæ,* which a jointure in many points resembles, and the like resemblance was still greater, while that species of dower continued in its primitive state: whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower.

CHAPTER XXVI.

ESTATES IN LAND CONSIDERED WITH REFERENCE TO THEIR DURATION AND EXTENT.

1. Variety of estates in land.—The next objects of our disquisitions are the nature and properties of estates. An estate in lands, tenements, and hereditaments, signifies such interest as the tenant has therein. And to ascertain this with proper precision and accuracy, estates may be considered in a three-fold view: first, with regard to the quantity of interest which the tenant has in the tenement: secondly, with regard to the time at which that quantity of interest is to be enjoyed: and thirdly, with regard to the number and connexions of the tenants.

First, with regard to the quantity of interest which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man: to determine at his own decease, or to remain to his descendants after him: or it is circumscribed within a certain number of years, months or days: or, lastly, it is infinite and unlimited, being vested in him and his representatives forever. And this occasions the primary division of estates into such as are freehold and such as are less than freehold.

2. Freehold estates.—An estate of freehold, *liberum tenementum,* or franktenement, is defined by Britton to be the "possession of the soil by a freeman." And St. Germyn tells us, that "the possession of the land is called in the law of England the franktenement or freehold." Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, freehold; which actual possession can, by the course of the common law, be only given by the ceremony called livery of seisin, which is the same as the feudal investiture. And from these principles we may extract this description of a freehold; that it is such an estate in lands as is conveyed by livery of seisin, or in tenements of any incorporeal nature, by what is equiva-

lent thereto. And accordingly it is laid down by Littleton, that where a freehold shall pass, it behooveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates. Estates of freehold (thus understood) are either estates of inheritance, or estates not of inheritance. The former are again divided into inheritances absolute, or fee-simple; and inheritances limited, one species of which we usually call fee tail.

3. Fee-simple estates.—Tenant in fee-simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever: generally, absolutely, and simply, without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law. A fee therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud: and when the term is used simply, without any other adjunct, or has the adjunct of simple annexed to it (as a fee or a fee-simple), it is used in contradistinction to a fee conditional at the common law, or a fee tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restriction to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man.

Taking therefore fee for the future, unless where otherwise explained in this its secondary sense, as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal.

The word "heirs" is necessary in the grant or donation, in order to make a fee, or inheritance. For if land be given to a man forever, or to him and his assigns forever, this vests in him but an estate for life. This very great nicety about the insertion of the word "heirs" in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness; by which we may remember it was required, that the form of the donation should be punctually pursued. The rule is now softened by statute, and it does not extend to devises by will; in which,

as they were introduced at the time when the feudal rigor was apace wearing out, a more liberal construction is allowed; and therefore by a devise to a man forever, or to one and his assigns forever, or to one in fee-simple, the devisee hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life; for it does not appear that the devisor intended any more.

4. **[No absolute ownership of land in legal theory.**—Absolute and unqualified dominion or ownership of land no subject in England has, it being the accepted theory of the law that all the lands in England are held directly or indirectly of the king. The king therefore alone has absolute dominion or "allodial" ownership of land, but the subject can have nothing but an estate which is held of a superior lord in whom the ultimate property resides.]

5. **Evolution of estates tail.**—An estate tail was evolved from a conditional fee or estate to a man and some particular heirs, as to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs male of his body, in exclusion both of collaterals, and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever; that, on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor.

The inconveniences which attended these limited and fettered inheritances led the judges to adopt a subtle finesse of construction in order to shorten the duration of these conditional fees. To this end they held that as soon as the grantee (under a gift to him and the heirs of his body) had any issue born, his estate became absolute by the performance of the condition, so that he could aliene the land and bar not only his own issue, but also the donor's reversion. Thus the conditional fee-simple was turned into a fee-simple absolute. But the nobility, who desired to perpetuate their land in their own families, procured

the statute of Westminster II *(de donis conditionalibus)*, which aimed to protect these family settlements against the construction by which the judges had defeated them in considerations of public convenience. This statute revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor.

Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a fee-tail; and investing in the donor the ultimate fee-simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion. And hence it is that Littleton tells us that tenant in fee tail is by virtue of the statute of Westminster the second.

6. Species of estates tail.—Tail-general is where lands and tenements are given to one, and the heirs of his body begotten; which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail, *per formam doni* (by the form of the gift).

Tenant in tail special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways. I shall instance in only one; as where lands and tenements are given to a man and the heirs of his body on Mary his now wife to be begotten; here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife; and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his heirs) give him an estate in fee: but they being heirs to be by him begotten, this makes it a fee tail; and the person being also limited, on whom such heirs shall be begotten (viz.: Mary his present wife), this makes it a fee tail special.

7. Creation and incidents of estates tail.—As the word heirs is necessary to create a fee, so in farther limitation of the

strictness of the feudal donation, the word body, or some other words of procreation, are necessary to make it a fee tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance, or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his issue of his body, to a man and his seed, to a man and his children, or offspring: all these are only estates for life, there wanting the words of inheritance, his heirs. So, on the other hand, a gift to a man, and his heirs male or female, is an estate in fee-simple, and not in fee tail: for there are no words to ascertain the body out of which they shall issue. In this, however, more irregular modes of expression are indulged. [These estates are not generally recognized in this country, but by statute a deed or devise in fee tail creates a fee-simple.]

The incidents to a tenancy in tail, under the statute Westm. 2, are chiefly these: (1) That a tenant in tail may commit waste on the estate-tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same. (2) That the wife of the tenant in tail shall have her dower, or thirds, of the estate-tail. (3) That the husband of a female tenant in tail may be tenant by the curtesy of the estate-tail. (4) That an estate-tail may be barred, or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir. At common law the statute *de donis* was eluded by fictitious suits, a kind of pious fraud, by which estates tail were unfettered and reduced again to almost the same state, even before issue born, as conditional fees were in at common law, after the condition was performed, by the birth of issue. For, first, the tenant in tail is now enabled to aliene his lands and tenements by fine, by recovery, or by certain other means; and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the crown: secondly, he is now liable to forfeit them for high treason: and lastly, he may charge them with reasonable leases, and also with such of his debts as are due to the crown on specialties, or have been contracted with his fellow-subjects in a course of extensive commerce.

Barring entails. The judges held, that collateral warranty was not within the statute de donis; as that act was principally

intended to prevent the tenant in tail from disinheriting his own issue; and therefore collateral warranty (though without assets) was allowed to be, as at common law, a sufficient bar of the estate-tail and all remainders and reversions expectant thereon. And so it still continues to be, notwithstanding the statute of Queen Anne, if made by tenant in tail in possession: who therefore may now, without the forms of a fine or recovery, in some cases make a good conveyance in fee-simple, by superadding a warranty to his grant; which, if accompanied with assets, bars his own issue, and without them bars such of his heirs as may be in remainder or reversion.

8. **Creation of life estate.**—We are next to discourse of such estates of freehold, as are not of inheritance, but for life only. And of these estates for life, some are conventional, or expressly created by the acts of the parties; others merely legal, or created by construction and operation of law. We will consider them both in their order.

Estates for life, expressly created by deed or grant (which alone are properly conventional), are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is styled tenant for life: only when he holds the estate by the life of another, he is usually called tenant *pur auter vie* (for the life of another). These estates for life are, like inheritances, of a feudal nature; and were, for some time, the highest estate that any man could have in a feud, which (as we have before seen) was not in its original hereditary. They are given or conferred by the same feudal rights and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lesssee, have agreed on.

Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grant to A B the manor of Dale, this makes him tenant for life. For though, as there are no words of inheritance or heirs mentioned in the grant, it cannot be construed to be a fee, it shall, however, be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant

at large, or a grant for term of life generally, shall be construed to be an estate for the life of the grantee; in case the grantor hath authority to make such a grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor, unless in the case of the king.

Conditional life estates. There are some estates for life, which may determine upon future contingencies, before the life, for which they are created expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet while they subsist, they are reckoned estates for life: because the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And moreover, in case an estate be granted to a man for his life, generally, it may also determine by his civil death: as, if he enters into a monastery, whereby he is dead in law: for which reason in conveyances the grant is usually made "for the term of a man's natural life"; which can only determine by his natural death.

9. Incidents to an estate for life.—These are principally the following, which are applicable not only to that species of tenants for life, which are expressly created by deed; but also to those which are created by act and operation of law:

(1) *Estovers.* Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable *estovers* or *botes.* For he hath a right to the full enjoyment and use of the land, and all its profits during his estate therein. But he is not permitted to cut down timber, or do other waste upon the premises: for the destruction of such things as are not the temporary profits of the tenement is not necessary for the tenant's complete enjoyment of his estate; but tends to the permanent and lasting loss of the person entitled to the inheritance.

(2) *Emblements.* Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his

estate, because such a determination is contingent and uncertain. Therefore if a tenant for his own life sows the lands and dies before harvest, his executors shall have the emblements or profits of the crop for the estate was determined by the act of God, and it is a maxim in the law, that *actus Dei nemini facit injuriam* (the act of God injures no man). The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labor and expense of tilling, manuring and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise of fruit trees, grass and the like; which are not planted annually at the expense and labor of the tenant, but are either a permanent or natural profit of the earth. For when a man plants a tree he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants.

(3) *Extend to subtenants.* A third incident to estates for life relates to the under-tenants, or lessees. For they have the same, nay, greater indulgences than their lessors, the original tenants for life. The same; for the law of estovers and emblements with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place: and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate* (during widowhood): her taking husband is her own act, and therefore deprives her of the emblements; but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her. The lessees of tenants for life had also at the common law another most unreasonable advantage; for at the death of their lessors, the tenants for life, these under-tenants might if they pleased quit the premises, and pay no rent to anybody for the occupation of the land since the last quarter day, or other day assigned for the

payment of rent. To remedy which it is now enacted, that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a ratable proportion of the rent from the last day of payment to the death of such lessor.

10. Waste.—The limitations on a tenant for life or other particular tenant are indicated by the law of waste. Waste is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, by a particular tenant, to the disherison of him that hath the remainder or reversion in fee-simple or fee tail. Waste is either *voluntary,* which is a crime of commission, as by pulling down a house; or it is *permissive,* which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste. Therefore removing wainscot, floors, or other things once fixed to the freehold of a house, is waste. If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste: but otherwise, if the house be burnt by the carelessness or negligence of the lessee: though now by the statute 6 Ann. c. 31, no action will lie against a tenant for an accident of this kind. Waste may also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance. Timber, also, is a part of the inheritance. Such are oak, ash, and elm in all places; and in some particular countries by local custom, where other trees are generally used for building, they are for that reason considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste. But underwood the tenant may cut down at any seasonable time that he pleases; and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions.

The conversion of land from one species to another is waste. To convert wood, meadow, or pasture into arable; to turn arable, meadow, or pasture into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste. For, as Sir Edward Coke observes, it not only changes the course of husbandry, but the evidence of the estate; when such a close,

which is conveyed and described as pasture, is found to be arable, and *e converso*. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in its value. To open the land to search for mines of metal, coal, &c., is waste; for that is a detriment to the inheritance: but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use; for it is now become the mere annual profit of the land. These three are the general heads of waste, viz.: in houses, in timber, and in land. Though, as was before said, whatever else tends to the destruction, or depreciating the value, of the inheritance is considered by the law as waste.

By statute, for above five hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste, absque impetitione vasti; that is, with a provision or protection that no man shall impetere, or sue him, for waste committed. But tenant in tail after possibility of issue extinct is not impeachable for waste. The punishment for waste was by common law only damages, but under the statute of Gloucester the tenant committing waste forfeits the estate and also treble damages to the holder of the future estate.

11. **Estate tail after possibility of issue extinct.**—A peculiar species of estate for life is of the legal kind, as contradistinguished from conventional; viz.: that of tenant in tail after possibility of issue extinct. This happens where one is tenant in special tail; and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct; in either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue: in this case the man has an estate-tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely tenant in fee tail special, that would not have distinguished him from others; and besides, he has no longer an estate of inheritance or fee, for he can have no heirs capable of taking *per formam doni*

(by the form of the gift). Had it called him tenant in tail without issue, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled tenant in tail without possibility of issue this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out, as this of tenant in tail after possibility of issue extinct, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished and gone.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii* (from the bond of matrimony), they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them. A possibility of issue is always supposed to exist, in law, unless extinguished by the death of the parties; even though the donees be each of them an hundred years old.

This estate is of an amphibious nature, partaking partly of an estate-tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of tenant in tail; as not to be punishable for waste, &c.; or, he is a tenant in tail, with many of the restrictions of a tenant for life; as to forfeit his estate, if he alienes it in fee-simple: whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner: who is not concerned in interest, till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life, which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.

12. Forfeiture for tortious feoffment.—Alienations by particular tenants, when they are greater than the law entitles them to make, and devest the remainder or reversion, were forfeitures to him whose right is attacked thereby. As, if tenant

for his own life aliens by feoffment or fine for the life of another, or in tail, or in fee; these being estates, which either must or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversion. For which there seem to be two reasons. First, because such alienation amounts to a renunciation of the feudal connexion and dependence; it implies a refusal to perform the due renders and services to the lord of the fee, of which fealty is constantly one; and it tends in its consequence to defeat and devest the remainder or reversion expectant: as therefore that is put in jeopardy, by such act of the particular tenant, it is but just that, upon discovery, the particular estate should be forfeited and taken from him, who has shown so manifest an inclination to make an improper use of it. The other reason is because the particular tenant, by granting a larger estate than his own, has by his own act determined and put an entire end to his own original interest; and on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. The same law, which is thus laid down with regard to tenants for life, holds also with respect to all tenants of the mere freehold or of chattel interests; but if tenant in tail alienes in fee, this is no immediate forfeiture to the remainderman, but a mere discontinuance (as it is called) of the estate-tail, which the issue may afterwards avoid by due course of law: for he in remainder or reversion hath only a very remote and barely possible interest therein, until the issue in tail is extinct. But, in case of such forfeitures by particular tenants, all legal estates by them before created, as if tenant for twenty years grants a lease for fifteen, and all charges by him lawfully made on the lands, shall be good and available in law. For the law will not hurt an innocent lessee for the fault of his lessor; nor permit the lessor, after he has granted a good and lawful estate, by his own act to avoid it, and defeat the interest which he himself has created.

13. Estates for years.—Of estates that are less than freehold, there are three sorts: (1) Estates for years: (2) Estates at will: (3) Estates by sufferance.

An estate for years is a contract for the possession of lands or tenements, for some determinate period; and it takes place

where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and lessee, and the lessee enters thereon. If the lease be but for half a year, or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of.

Why less than freehold. These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions or other rent, to the lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate; but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated by a common recovery suffered by the tenant of the freehold; which annihilated all leases for years then subsisting, unless afterwards renewed by the recoverer, whose title was supposed superior to his by whom those leases were granted.

Certainty of duration. Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, terminus, because its duration or continuance is bounded, limited, and determined: for every such estate must have a certain beginning and certain end. But *id certum est, quod certum reddi potest* (that is certain which can be made certain): therefore if a man make a lease to another, for so many years as J S shall name, it is a good lease for years; for though it is at present uncertain, yet when J S hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease. A lease for so many years as J S

shall live, is void from the beginning, for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J S shall so long live, or if he should so long continue parson, is good: for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J S or his ceasing to be parson there.

We have before remarked, and endeavored to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even if it be *pur auter vie,* is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate.

14. Possession of the term versus seisin of the land.—A lease for years may be made to commence *in futuro,* though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro;* because it cannot be created at common law without livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter. And, because no livery of seisin is necessary to a lease for years, such lessee is not said to be seised, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his interest in the term, or *interesse termini:* but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is possessed, not properly of the land, but of the term of years: the possession of seisin of the land, remaining still in him who hath the freehold. Thus the word, term, does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the term may expire, during the continuance of the time; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A for the term of three years, and after the expiration of the said term, to B for six years, and A

surrenders or forfeits his lease at the end of one year, B's interest shall immediately take effect: but if the remainder had been to B from and after the expiration of the said three years, or from and after the expiration of the said time, in this case B's interest will not commence till the time is fully elapsed; whatever may become of A's term.

15. Incidents of tenancy.—Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers, which we formerly observed that tenant for life was entitled to: that is to say, house-bote, fire-bote, plough-bote, and hay-bote.

With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him and tenant for life; that where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of. But where the lease for years depends upon an uncertainty: as, upon the death of the lessor, being himself only tenant for life, or being a husband seized in right of his wife; or if the terms of years be determinable upon a life or lives; in all these cases the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. Not so, if it determine by the act of the party himself: as if tenant for years does anything that amounts to a forfeiture: in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default.

16. Estates at will.—The second species of estates not freehold, are estates at will. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession. Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will, is at the will of both parties, landlord and tenant; so that either of them may deter-

mine his will, and quit his connexions with the other at his own pleasure. Yet this must be understood with some restrictions. For if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits. And this for the same reason upon which all the cases for emblements turn; viz.: the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land.

Termination of tenancy. What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land, or notice must be given to the lessee) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, taking a distress for rent, and impounding it thereon, or making a feoffment, or lease for years of the land, to commence immediately; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such tenure, or, which is *instar omnium* (equal to all), the death or outlawry of either lessor or lessee: puts an end to or determines the estate at will.

The law is, however, careful that no sudden determination of the will by one party shall tend to the manifest and unforseen prejudice of the other. This appears in the case of emblements before mentioned; and, by a parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils. And if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year. And, upon the same principle, courts of law have of late years leaned as much as possible

against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be *tenancies from year to year* so long as both parties please, especially where an annual rent is reserved: in which case they will not suffer either party to determine the tenancy, even at the end of the year, without reasonable notice to the other, which is generally understood to be six months.

17. **An estate at sufferance.**—This is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and after a year is expired continues to hold the premises without any fresh leave from the owner of the estate. Or if a man maketh a lease at will and dies, the estate at will is thereby determined: but if the tenant continueth possession, he is tenant at sufferance. But no man can be tenant at sufferance against the king, to whom no laches, or neglect in not entering and ousting the tenant, is ever imputed by law; but his tenant, so holding over, is considered as an absolute intruder. But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant: for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger: and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land, by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

Thus stands the law with regard to tenants by sufferance, and landlords are obliged in these cases to make formal entries upon their lands, and recover possession by the legal process of ejectment; and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained. [By statute summary remedies are given against tenants holding over.]

CHAPTER XXVII.

ESTATES IN SEVERALTY—JOINT-TENANCY—COPARCENARY—TENANTS IN COMMON.

1. Estates in severalty.—We come now to treat of estates, with respect to the number and connexions of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways; in severalty, in joint-tenancy, in coparcenary, and in common.

He that holds lands or tenements in severalty, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here, that we will upon estates in possession as contradistinguished from those in expectancy: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. I shall therefore proceed to consider the other three species of estate, in which there are always a plurality of tenants.

2. Joint-tenancy—Creation and properties.—An estate in joint-tenancy is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years or at will.

In consequence of such grants an estate is called an estate in joint-tenancy, and sometimes an estate in jointure, which words as well as the other signifies an union or conjunction of interest; though in common speech the term jointure is now usually confined to that joint estate, which by virtue of statute 27 Hen. VIII, c. 10, is frequently vested in the husband and wife

before marriage, as a full satisfaction and bar of the woman's dower.

In unfolding this title, and the two remaining ones, in the present chapter, we will first inquire how these estates may be created; next, their properties and respective incidents; and lastly, how they may be severed or destroyed.

The creation of an estate in joint-tenancy depends on the wording of the deed or devise, by which the tenants claim title: for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects. For,

The properties of a joint estate are derived from its unity, which is four-fold; the unity of interest, the unity of title, the unity of time, and the unity of possession; or in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

(1) They must have one and the same interest. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail. But if land be limited to A and B for their lives, this makes them joint-tenants of the freehold; if to A and B and their heirs, it makes them joint-tenants of the inheritance. If the land be granted to A and B for their lives, and to the heirs of A; here A and B are joint-tenants of the freehold during their respective lives, and A has the remainder of the fee in severalty: or if land be given to A and B, and the heirs of the body of A; here both have a joint estate for life, and A hath a several remainder in tail.

(2) Joint-tenants must also have an unity of *title;* their estate must be created by one and the same act, whether legal or illegal: as by one and the same grant, or by one and the

same disseisin. Joint-tenancy cannot arise by descent or act of law; but merely by purchase or acquisition by the act of the party: and unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure.

(3) There must also be an unity of *time;* their estates must be vested at one and the same period, as well as by one and the same title. And in case of a present estate made to A and B; or a remainder in fee to A and B after a particular estate; in either case A and B are joint-tenants of this present estate, or this vested remainder. But, if after a lease for life, the remainder be limited to the heirs of A and B; and during the continuance of the particular estate A dies, which vests the remainder of one moiety in his heir; and then B dies, whereby the other moiety becomes vested in the heir of B: now A's heir and B's heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at another. Yet where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though vested at different times: because the use of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation.

(4) In joint-tenancy there must be an unity of *possession.* Joint-tenants are said to be seised *per my et per tout,* by the half or moiety, and by all: that is, they each of them have the entire possession, as well as every parcel as of the whole. They have not, one of them a seisin of one-half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety. And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moities, but both are seised of the entirety, *per tout, et non per my* (by all, and not by the half): the consequence of which is,

that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.

3. Incidents of joint tenancy.—Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint reversion. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity or relation of their estate. On the same reason, livery of seisin, made to one joint-tenant, shall enure to both of them: and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both. In all actions also relating to their joint-estate, one joint-tenant cannot sue or be sued without joining the other. One joint-tenant cannot have an action against another for trespass, in respect of his land; for each has an equal right to enter on any part of it. But one joint-tenant is not capable by himself to do any act which may tend to defeat or injure the estate of the other; as to let leases, or to grant copy-holds: and if any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other, by construction of the statute of Westm. 2, c. 22. So, too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted himself his bailiff or receiver, yet now by the statute 4 Ann. c. 16, joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy.

Survivorship. From the same principle also arises the remaining grand incident of joint-estate; viz.: the doctrine of survivorship: by which when two or more persons are seised of a joint estate, or inheritance, for their own lives, or *pur auter vie,* or are jointly possessed of any chattel-interest, the entire tenancy, upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate. This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants is not only equal

or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But, while it continues, each of two joint-tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not divested by the death of his companion; and no other person can now claim to have a joint estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a separate interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all, and every part. As therefore the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

4. How estate severed.—We are, lastly, to inquire how an estate in joint-tenancy may be severed and destroyed. And this may be done by destroying any of its constituent unities.

(1) That of time, which respects only the original commencement of the joint-estate, cannot indeed (being now past) be affected by any subsequent transactions. But,

(2) The joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their possession. For joint-tenants being seized *per my et per tout*, every thing that tends to narrow that interest, so that they shall not be seised throughout the whole, and throughout every part, is a severance or destruction of the jointure. And therefore, if two joint-tenants agree to part their lands, and hold them in severalty, they are no longer joint tenants: for they have now no joint interest in the whole, but only a several interest respectively in the several parts. And for that reason, also, the right of survivorship is by such separation destroyed. By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do: for this being an estate originally created by the act and agreement of the parties,

the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now by the statute 31 Hen. VIII, c. 1, and 32 Hen. VIII, c. 32, joint-tenants, either of inheritances or other less estates, are compellable, by writ of partition to divide their lands.

(3) The jointure may be destroyed by destroying the unity of title. As if one joint-tenant alienes and conveys his estate to a third person: here the joint-tenancy is severed, and turned into tenancy in common; for the grantee and the remaining joint-tenant hold by different titles (one derived from the original, the other from the subsequent grantor), though, till partition made, the unity of possession continues. But a devise of one's share by will is no severance of the jointure: for no testament takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has therefore a priority to the other) is already vested.

(4) It may also be destroyed by destroying the unity of interest. And therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure; though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure: for it destroys the unity both of title and of interest. And, whenever or by whatever means the jointure ceases or is severed, the right of survivorship, or *jus accrescendi*, the same instant ceases with it. Yet, if one of the joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship: and if one of three joint-tenants release his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure; for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these

four indispensable properties, a sameness of interest, an undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

Utility of severing. In general it is advantageous for the joint-tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint estate: as if there be joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety. And therefore if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture: for, in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant, by a tenant for his own life merely, is a forfeiture of his estate; for it is creating an estate which may possibly last longer than that which he is legally entitled to.

5. **Estates in coparcenary.**—An estate held in coparcenary is where lands of inheritance descend from the ancestor to two or more persons. It arises either by common law or particular custom. By common law: as where a person seised in fee-simple or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, as will be more fully shown when we treat of descents hereafter; and those co-heirs are then called coparceners; or, for brevity, parceners only. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, etc. And in either of these cases, all the parceners put together make but one heir, and have but one estate among them. Parceners are so called because they may be constrained to make partition by action in which each is assigned his part in severalty.

6. **Tenancy in common.**—Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all

occupy promiscuously. This tenancy, therefore, happens where there is a unity of possession merely, but perhaps an entire disunion of interest, of titles and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no necessary unity of interest; one may hold by descent, the other by purchase; or the one by purchase from A, the other by purchase from B; so that there is no unity of title; one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession: and for this Littleton gives the true reason, because no man can certainly tell which part is his own; otherwise even this would be soon destroyed.

How created. Tenancy in common may be created, either by the destruction of the two other estates in joint-tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates, I mean such destruction as does not sever the unity of possession, but only the unity of title or interest: As, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they have now several titles, the other joint-tenant by the original grant, the alienee by the new alienation; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A in tail, and the other gives his to B in tail, the donees are tenants in common, as holding by different titles and conveyances. If one of two parceners alienes, the alienee and the remaining parcener are tenants in common; because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two men, or two women, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to a man and woman, and the heirs of their bodies begotten: and in this, and the like cases, their issue shall be tenants in common; because they must claim by different titles, one as heir of A, and the other as heir of B; and those two not titles by purchase, but descent. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there

be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

A tenancy in common may also be created by express limitation in a deed; but here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in its constructions to favor joint-tenancy rather than tenancy in common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common, and, if one grants to another half his land, the grantor and grantee are also tenants in common: because, as has been before observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed, that it is impossible they should take a joint interest in the whole of the tenements. But a devise to two persons to hold jointly and severally, is said to be a joint-tenancy; because that is necessarily implied in the word "jointly," the word "severally" perhaps only implying the power of partition; and an estate given to A and B, equally to be divided between them, though in deeds it hath been said to be a joint-tenancy for it implies no more than the law has annexed to that estate, viz.: divisibility, yet in wills it is certainly a tenancy in common, because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. And this nicety in the wording of grants makes it the most usual as well as the safest way, when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A and B, to hold as tenants in common, and not as joint-tenants.

As to the incidents attending a tenancy in common. Tenants in common (like joint-tenants) are compellable by statutes of Henry VIII and William III, before mentioned, to make partition of their lands; which they were not at common law. They properly take by distinct moieties, and have no entirety of interest; and therefore there is no survivorship between tenants in common. Their other incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to joint-tenants merely upon that account; such as being liable to reciprocal actions of waste, and of account, by the statutes

of Westm. 2, c. 22, and 4 Ann. c. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate; though, if one actually turns the other out of possession, an action of ejectment will lie against him. But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest (such as joining or being joined in actions, unless in the case where some entire or indivisible thing is to be recovered), these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several.

How dissolved. Estates in common can only be dissolved two ways: (1) By uniting all the tities and interests in one tenant, by purchase or otherwise: which brings the whole to one severalty. (2) By making partition between the several tenants in common, which gives them all respective severalties. For indeed tenancies in common differ in nothing from sole estates but merely in the blending and unity of possession.

CHAPTER XXVIII.

MORTGAGES AND ESTATES UPON CONDITION.

1. **Conditions express or implied.**—Besides the several divisions of estates, in point of interest, which we have considered in the preceding chapters, there is also another species still remaining, which is called an estate upon condition; being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated. And these conditional estates I have chosen to reserve, because they are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions.

Estates, then, upon condition thus understood, are of two sorts: (1) Estates upon condition implied: (2) Estates upon condition expressed: under which last may be included, (3) Estates held in vadio, gage, or pledge: (4) Estates by statute merchant, or statute staple: (5) Estates held by elegit.

Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words.

Upon this principle proceed all the forfeitures which are given by law of life estates and others; for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee-simple: this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, viz.: that they shall not attempt to create a greater estate than they themselves are entitled to. So if any tenants for years, for life, or in fee, commit a felony; the king or other lord of the fee is entitled to have their tenements, be-

cause their estate is determined by the breach of the condition, "that they shall not commit felony," which the law tacitly annexes to every feudal donation.

An estate on condition expressed in the grant itself is where an estate is granted, either in fee-simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged or be defeated, upon performance or breach of such qualification or condition. These conditions are therefore either precedent or subsequent.

Precedent or subsequent. Precedent are such as must happen or be performed before the estate can vest or be enlarged: subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A upon his marriage with B, the marriage is a precedent condition, and till that happens no estate is vested in A. Or, if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee-simple passeth not till the hundred marks be paid. But if a man grants an estate in fee-simple, reserving to himself and his heirs a certain rent; and that if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed.

To this class may also be referred all base fees and fee-simples conditional at the common law. Thus an estate to a man and his heirs, tenants of the manor of Dale, is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body, as this is no tenement within the statute of Westminster the second, it remains as at common law, a fee-simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned in the eighth chapter: as *durante viduitate,* etc.; these are estates upon condition that the grantees do not marry, and the like. And, on the breach of any of these subsequent conditions, by the failure of these contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the

estates which were respectively vested in each grantee are wholly determined and void.

2. **Conditions distinguished from limitations.**—A distinction is, however, made between a condition in deed and a limitation, which Littleton denominates also a condition in law. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a limitation: as when land is granted to a man so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made 500*l.*, and the like. In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500*l.*) and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon condition in deed (as if granted expressly upon condition to be void upon the payment of 40*l.* by the grantor, or so that the grantee continues unmarried, or provided he goes to York, etc.), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate.

Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs), this the law construes to be a limitation and not a condition: because if it were a condition, then, upon the breach thereof, only A or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of B determines, and that of D commences, and he may enter on the lands the instant that the failure happens. So also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-

payment, for none but the heir himself could have entered for a breach of the condition.

In all these instances, of limitations or conditions subsequent, it is to be observed, that so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life; or no estate at all, which is constructively an estate for life. For, the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold, because the estate is capable to last forever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner (as a grant for ninety-nine years, provided A, B and C, or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

3. **Effect of invalidity of conditions.**—These express conditions, if they be impossible at the time of the creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be contrary to law or repugnant to the nature of the estate, are void. In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a feoffment be made to a man in fee-simple, on condition that unless he goes to Rome in twenty-four hours; or unless he marries with Jane S. by such a day (within which time the woman dies, or the feoffor marries her himself); or unless he kills another; or in case he alienes in fee: that then and in any of such cases the estate shall be vacated and determine; here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal or repugnant. But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing

by the grant: for he hath no estate until the condition be performed.

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are:

4. Tenancy in mortgage.—Estates held *in vadio,* in *gage,* or pledge; which are of two kinds, *vivum vadium,* or living pledge; and *mortuum vadium,* dead pledge, or mortgage.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another; and grants him an estate, as of 20*l.* per annum, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living; it subsists, and survives the debt; and immediately on the discharge of that, results back to the borrower. But *mortuum vadium,* a dead pledge, or mortgage (which is much more common than the other), is where a man borrows of another a specific sum (*e. g.,* 200*l.*) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, then the mortgagee shall re-convey the estate to the mortgagor: in this case, the land, which is so put in pledge, is by law, in case of non-payment at the time limited, forever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage. But as it was formerly a doubt, whether, by taking such estate in fee, it did not become liable to the wife's dower, and other incumbrances, of the mortgagee (though that doubt has been long ago overruled by our courts of equity), it therefore became usual to grant only a long term of years by way of mortgage; with condition to be void on repayment of the mortgage-money; which course has been since pretty generally continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

Right of possession. As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility at law of being afterwards evicted by the mortgagor, to whom the land is now forever dead.

5. Equity of redemption.—But here again the courts of equity interpose; and though a mortgage be thus forfeited and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate; paying to the mortgagee his principal, interest, and expenses: for otherwise, in strictness of law, an estate worth 100*l.* might be forfeited for non-payment of 100*l.* or a less sum. This reasonable advantage, allowed to mortgagors, is called the equity of redemption: and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium.* But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or in default thereof, to be forever foreclosed from redeeming the same; that is, to lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not however usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands in the nature of a pledge, or the *pignus* of the Roman law: whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca,* which was, where the possession

of the thing pledged remained with the debtor. But by statute 7 Geo. II, c. 20, after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment; but may be compelled to re-assign his securities. In Glanvil's time, when the universal method of conveyance was by livery of seisin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor.

6. Other security interests in land.—Another species of estates, defeasible on condition subsequent, are those held by statute merchant, and statute staple; which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I, *de mercatoribus* (of merchants), and thence called a statute merchant; the other pursuant to the statute 27 Edw. III, c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns, from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple.

Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called, an *estate by elegit*. At present I need only mention *elegit*, that name of a writ, founded on the statute of Westm. 2, by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one-half of the defendant's lands, to be occupied and enjoyed until judgment be fully paid.

CHAPTER XXIX.

EQUITABLE ESTATES.

1. Invention of uses.—Alienation in mortmain, *in mortua manu,* is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of mortmain. In spite of many legislative acts to prevent the accumulations of lands by monasteries, it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees to the use of the religious houses.

This notion was transplanted into England from the civil law, about the close of the reign of Edward III, by means of the foreign ecclesiastics; who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to their religious houses directly, but to the use of the religious houses: which the clerical chancellors of those times held to be nominal feofee binding in conscience; and therefore assumed the jurisdiction which Augustus had vested in his prætor, of compelling the execution of such trusts in the court of chancery. And as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet if a testator had enfeoffed another to his own use, and so was possessed of the use only, such use was devisable by will.

Use may be defined as a confidence reposed in another who was tenant of the land, that he should dispose of the land according to the intentions of cestuy que use, for him to whose use it was granted, and suffer him to take the profits. As, if a

feoffment was made to A and his heirs, to the use of (or in trust for) B and his heirs; here at the common law A had the legal property, seisin, and possession of the land, but B, the cestuy que use, was in conscience and equity to have the profits and disposal of it.

Yet, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes: particularly as it removed the restraint of alienations by will, and permitted the owner of lands in his lifetime to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time require. Till at length, during our long wars in France, and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal; through the desire that men had (when their lives were continually in hazard) of providing for their children by will, and securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore, about the reign of Edw. IV (before whose time, Lord Bacon remarks, there are not six cases to be found relating to the doctrine of uses), the courts of equity began to reduce them to something of a regular system.

2. **Interest of the cestuy que use.**—Originally it was held that the chancery could give no relief, but against the very person himself intrusted for cestuy que use, and not against his heir or alienee. This was altered in the reign of Henry VI, with respect to the heir; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use. But a purchaser for a valuable consideration without notice, might hold the land discharged of any trust or confidence.

The nature of the use, or interest of cestuy que use, was learnedly refined upon with many elaborate distinctions. And, (1) it was held that nothing could be granted to a use, whereof the use is inseparable from the possession; as annuities, ways, commons, and authorities, *quæ ipso usu consumuntur* (which are consumed by the use itself): or whereof the seisin could not be instantly given. (2) A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another, without any consideration, equity presumes that he

meant it to the use of himself, unless he expressly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions. But if either a good or valuable consideration appears, equity will immediately raise a use correspondent to such consideration. (3) Uses were descendible according to the rules of the common law, in the case of inheritances in possession; for in this and many other respects *æquitas sequitur legem* (equity follows law), and cannot establish a different rule of property from that which the law has established. (4) Uses might be assigned by secret deeds between the parties, or be devised by last will and testament; for, as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary; and, as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But cestuy que use could not at common law aliene the legal interest of the lands, without the concurrence of his feoffee; to whom he was accounted by law to be only tenant at sufferance. (5) Uses were not liable to any of the feudal burthens; and particularly did not escheat for felony or other defect of blood; for escheats, etc., are the consequence of tenure, and uses are held of nobody: but the land itself was liable to escheat, whenever the blood of feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use. (6) No wife could be endowed, or husband have his curtesy, of a use: for no trust was declared for their benefit, at the original grant of the estate. And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives; which was the original of modern jointures. (7) A use could not be extended by writ of *elegit*, or other legal process, for the debts of cestuy que use. For, being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, could award no process against it.

3. **Statute of uses.**—These provisions all tended to consider cestuy que use as the real owner of the estate; and at length that idea was carried into full effect by the statute 27 Hen. VIII, c. 10, which is usually called the statute of uses, or, in conveyances and pleadings, the statute for transferring uses

into possession. The statute of Henry VIII, after reciting the various inconveniences of uses, enacts, that "When any person shall be seised of lands, etc., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of land, &c., of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition, as they had before in use." The statute thus executes the use, as our lawyers term it; that is, conveys the possession to the use, and transfers the use into possession; thereby making cestuy que use complete owner of the lands and tenements, as well at law as in equity.

Effect of statute. The statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of cestuy que use into a legal instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons only were held capable of being seised to a use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchaser discharged by the use, nor be liable to dower or curtesy on account of the seisin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to cestuy que use as soon as the use is declared. And, as the use and land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seisin of cestuy que use, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.

4. Springing and shifting uses.—The various necessities of mankind induced also the judges very soon to depart from the

rigor and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses than upon others. Hence it was adjudged that the use need not always be executed the instant the conveyance is made: but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time; and in the meanwhile the ancient use shall remain in the original grantor: as, when lands are conveyed to the use of A and B, after a marriage shall be had between them, or to the use of A and his heirs till B shall pay him a sum of money, and then to the use of B and his heirs. Which doctrine, when devises by will were again introduced, and considered as equivalent in point of construction to declaration of uses, was also adopted in favor of executory devises.

But herein these, which are called contingent or springing uses, differ from an executory devise; in that there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute; and therefore if the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed forever; whereas by an executory devise the freehold itself is transferred to the future devisee. And, in both these cases, a fee may be limited to take effect after a fee; because, though that was forbidden by the common law in favor of the lord's escheat, yet when the legal estate was not extended beyond one fee-simple, such subsequent uses (after a use in fee) were before the statute permitted to be limited in equity; and then the statute executed the legal estate in the same manner as the use before subsisted. It was also held, that a use, though executed, may change from one to another by circumstances, ex post facto; as, if A makes a feoffment to the use of his intended wife and her eldest son for their lives; upon the marriage the wife takes the whole use in severalty; and upon the birth of a son, the use is executed jointly in them both. This is sometimes called a secondary, sometimes a shifting use.

And, whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is styled a resulting use. As, if a man makes a feoffment to the use of his intended wife, for

life, with remainder to the use of her first-born son in tail; here, till he marries, the use results back to himself; after marriage, it is executed in the wife for life: and if she dies without issue, the whole results back to him in fee.

Power of revocation. It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow, was a deed of defeazance coeval with the grant itself, and therefore esteemed a part of it, upon events specially mentioned. And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead. And this was permitted, partly to indulge the conveniences, and partly the caprice of mankind; who (as Lord Bacon observes) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards.

5. Establishment of trusts.—By this equitable train of decisions in the courts of law, the power of the court of chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use;" and that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a farther use to another person is repugnant, and therefore void. And therefore on a feoffment to A and his heirs, to the use of B and his heirs, in trust for C and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity: not adverting, that the instant the first use was executed in B, he became seised to the use of C, which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down through a hundred uses upon uses, till finally executed in the last cestuy que use. Again; as the statute mentions only such persons as were seised to the use of others, this was held not to extend to terms of years or other chattel interests, whereof the termor is not seised, but only possessed; and therefore, if a term of one thousand years be limited to A, to the use of (or in trust for) B, the statute does not execute this use, but

leaves it as at common law. And lastly (by more modern resolutions), where lands are given to one and his heirs, in trust to receive and pay over the profits to another, this use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust.

Uses revived as trusts. Of the two more ancient distinctions the courts of equity quickly availed themselves. In the first case it was evident, that B was never intended by the parties to have any beneficial interest; and, in the second, the cestuy que use of the term was expressly driven into the court of chancery to seek his remedy: and therefore the court determined, that though these were not uses which the statute could execute, yet still they were trusts in equity, which in conscience ought to be performed. To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of trusts; and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance.

6. Incidents of trust estates.—However, the courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. The statute of frauds, 29 Car. II, c. 3, having required that every declaration, assignment or grant of any trusts in lands or hereditaments (except such as arise from implication or construction of law), shall be made in writing signed by the party, or by his written will: the courts now consider a trust-estate (either when expressly declared or resulting by such implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law: and by a long series of uniform determinations, for now near a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice; which, as cestuy que use is generally in possession of the land, is a thing that can rarely happen. The trust

will descend, may be aliened, is liable to debts, to execution on judgments, statutes and recognizances (by the express provision of the statute of frauds), to forfeiture, to leases, and other incumbrances, nay even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subjected to dower, more from a cautious adherence to some hasty precedents than from any well-grounded principle. It hath also been held not liable to escheat to the lord, in consequence of attainder or want of heirs; because the trust could never be intended for his benefit.

CHAPTER XXX.

EASEMENTS AND INCORPOREAL HEREDITAMENTS.

1. **Nature of incorporeal rights.**—An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but being merely a contingent springing right, collateral to or issuing out of lands, can never be the object of sense; that casual share of the annual increase is not, till severed, capable of being shown to the eye, nor of being delivered into bodily possession. Incorporeal hereditaments are principally of ten sorts: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities and rents.

2. **Rights of common.**—Common, or right of common, appears from its very definition to be an incorporeal hereditament: being a profit which a man hath in the land of another; as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like. And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers.

3. **Rights of way.**—Another species of incorporeal hereditaments is that of ways; or the right of going over another man's ground. I speak not here of the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be grounded on a special permission; as when the owner of the land grants to another a liberty of passing over his grounds, to go to church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone: it dies with the person; and, if the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person in his company. A way may be also by prescription; as if all the inhabitants of

such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose; for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created. A right of way may also arise by act and operation of law; for if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come at it; and I may cross his land for that purpose without trespass. For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same. By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased; which was the established rule in public as well as private ways. And the law of England, in both cases, seems to correspond with the Roman.

4. **Offices and dignities.**—Offices, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments; whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only; save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators. Neither can any judicial office be granted in reversion: because though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and insufficient: but ministerial offices may be so granted, for those may be executed by deputy. Also, by statute 5 and 6 Edw. VI, c. 16, no public office (a few only excepted) shall be sold, under pain of disability to dispose of or hold it. For the law presumes that he who buys an office will, by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public.

Dignities bear a near relation to offices. It will be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.

5. **Franchises.**—Franchise and liberty are used as synonymous terms; and their definition is a royal privilege, or branch

of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant; or in some cases may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various, and almost infinite; I will here briefly touch upon some of the principal; premising only, that they may be vested in either natural persons or bodies politic; in one man or in many; but the same identical franchise, that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant.

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise, for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession, and do other corporate acts. To have a fair or market: with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like, is a franchise; which tolls must have a reasonable cause of commencement (as in consideration of repairs, or the like), else the franchise is illegal and void.

6. Annuities and rents.—An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burthen imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor. Therefore, if a man by deed grant to another the sum of 20*l.* per annum, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity; which is of so little account in the law, that if granted to an eleemosynary corporation, it is not within the statutes of mortmain; and yet a man may have a real estate in it, though his security is merely personal.

Rents are the last species of incorporeal hereditaments. The word rent or render, *reditus,* signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal.

There are at common law three manner of rents, rent-service, rent-charge, and rent-seck. Rent-service is so called because it hath some corporeal service incident to it, as at the least fealty

or the feudal oath of fidelity. For, if a tenant holds his land by fealty, and ten shillings rent; or by the service of ploughing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or arrere, at the day appointed, the lord may distrein of common right, without reserving any special power of distress; provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. A rent-charge is where the owner of the rent hath no future interest, or reversion expectant in the land: as where a man by deed maketh over to others his whole estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrere, or behind, it shall be lawful to distrein for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed: and therefore it is called a rent-charge, because in this manner the land is charged with a distress for the payment of it. Rent-seck, *reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

CHAPTER XXXI.

FUTURE ESTATES AT LAW.

1. Estates in possession.—We are now to consider estates in another view; with regard to the time of their enjoyment, when the actual pernancy of the profits (that is, the taking, perception, or receipt, of the rents and other advantages arising therefrom) begins. Estates therefore with respect to this consideration, may either be in possession, or in expectancy: and of expectancies there are two sorts; one created by the act of the parties, called a remainder; the other by act of law, and called a reversion.

Of estates in possession (which are sometimes called estates executed, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates executory), there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will therefore require a minute discussion, and demand some degree of attention.

2. Remainders.—An estate then in remainder may be defined to be an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee-simple granteth lands to A for twenty years, and, after the determination of the said term, then to B and his heirs forever: here A is tenant for years, remainder to B in fee. In the first place, an estate for years is created or carved out of the fee, and given to A; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee. They are indeed different parts, but they constitute only one whole; they are carved out of one

and the same inheritance; they are both created, and may both subsist, together; the one in possession, the other in expectancy. So if land be granted to A for twenty years, and after the determination of the said term to B for life; and after the determination of B's estate for life, it be limited to C and his heirs forever; this makes A a tenant for years, with remainder to B for life, remainder over to C in fee. Now here the estate of inheritance undergoes a division into three portions; there is first A's estate for years carved out of it; and after that B's estate for life; and then the whole that remains is limited to C and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance; and if there were a hundred remainders, it would still be the same thing; upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole.

No remainder on a fee-simple. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple: because a fee-simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the whole of the estate; a remainder therefore, which is only a portion or residuary part, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only one fee-simple: as 40*l.* is part of 100*l.* and 60*l.* is the remainder of it: wherefore after a fee-simple once vested, there can no more be a remainder limited thereon, than, after the whole 100*l.* is appropriated, there can be any residue subsisting.

Thus much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

3. **The particular estate precedent.**—And, first, there must necessarily be some particular estate precedent to the estate in remainder. As, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail. This precedent estate is called the particular estate, as being only a small part, or *particula,* of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder,

arises from this plain reason: that remainder is a relative expression, and implies that some part of the thing is previously disposed of; for where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession.

No freehold to commence in futuro at law. An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder; it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests; which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree; but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law, that an estate of freehold cannot be created to commence *in futuro;* but it ought to take effect presently either in possession or remainder; because at common law no freehold in lands could pass without livery of seisin; which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A for seven years, to commence from next Michaelmas, is good; yet a conveyance to B of lands, to hold to him and his heirs forever from the end of three years next ensuing, is void.

So when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A for three years, with remainder to B in fee, and makes livery of seisin to A; hereby the livery of the freehold is immediately created, and vested in B, during the continuance of A's term of years. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in præsenti*

(immediately), though to be occupied and enjoyed *in futuro* (at a future period).

As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to support the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over. For an estate at will is of a nature so slender and precarious that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a remainder. Besides, if it be a freehold remainder, livery of seisin must be given at the time of its creation; and the entry of the grantor to do this determines the estate at will in the very instant in which it is made: or if the remainder be a chattel interest, though perhaps the deed of creation might operate as a future contract, if the tenant for years be a party to it, yet it is void by way of remainder: for it is a separate, independent contract, distinct from the precedent estate at will; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken. And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also: as where the particular estate is an estate for the life of a person not *in esse;* or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate; in either of these cases the remainder over is void.

4. When created.—A second rule to be observed is this; that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate. As, where there is an estate to A for life, with remainder to B in fee: here B's remainder in fee passes from the grantor at the same time that seisin is delivered to A of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made on the particular estate, whenever a freehold remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor, otherwise the remainder is void. Not that the livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession

of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and inure to him in remainder, as both are but one estate in law.

5. **When it must vest.**—A third rule respecting remainders is this: that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* (from the instant) that it determines. As, if A be tenant for life, remainder to B in tail: here B's remainder is vested in him, at the creation of the particular estate to A for life: or if A and B be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives, the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies before B hath any son; here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate: and even supposing that B should afterwards have a son, he shall not take by this remainder; for as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone forever. And this depends upon the principle before laid down, that the precedent particular estate, and the remainder, are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate and the remainder supported thereby: the thing supported must fall to the ground, if once its support be severed from it.

6. **Contingent and vested remainders.**—It is upon these rules, but principally the last, that the doctrine of contingent remainders depends. For remainders are either vested or contingent. Vested remainders (or remainders executed, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As if A be tenant for twenty years, remainder to B in fee; here B's is a vested remainder, which nothing can defeat or set aside.

Contingent or executory remainders (whereby no present

interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event; so that the particular estate may chance to be determined, and the remainder never take effect.

First, they may be limited to a dubious and uncertain person. As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a son or no; but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if A had died before the contingency happened, that is, before B's son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A were tenant for life, remainder to his own eldest son in tail, and A died without issue born, but leaving his wife enceinte, or big with child, and after his death a posthumous son was born, this son could not take the land by virtue of this remainder; for the particular estate determined before there was any person *in esse*, in whom the remainder could vest. But, to remedy this hardship, it is enacted by statute 10 and 11 Wm. III, c. 16, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime: that is, the remainder is allowed to vest in them, while yet in their mother's womb.

Uncertain person. This species of contingent remainders to a person not in being, must however be limited to some one, that may by common possibility, or *potentia propinqua*, be *in esse* at or before any particular estate determines. As if an estate be made to A for life, remainder to the heirs of B; now, if A dies before B, the remainder is at an end; for during B's life he has no heir, *nemo est hæres viventis* (no one is heir to the living): but if B dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B's dying before A is *potentia propinqua*, and therefore allowed in law. But a remainder to the right heirs of B (if there be no such person as B *in esse*), is void. For here there must two contingents happen; first, that such a person as B shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which makes it *potentia remotissima*, a

most improbable possibility. A remainder to a man's eldest son, who hath none (we have seen) is good, for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of that particular name. A limitation of a remainder to a bastard before it is born is not good, for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent on account of the uncertainty of the person who is to take it.

Uncertain event. A remainder may also be contingent where the person to whom it is limited is fixed and certain, but the event upon which it is to take effect is vague and uncertain. As where land is given to A for life, and in case B survives him, then with the remainder to B in fee; here B is a certain person but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent; and if B dies first it can never vest in his heirs but is forever gone; but if A dies first, the remainder to B becomes vested.

Particular estate of freehold necessary. Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years or any other particular estate, less than a freehold. Thus, if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void; but if granted to A for life, with like remainder, it is good. For unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest nowhere; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

7. How defeated.—Contingent remainders may be defeated by destroying or determining the particular estate upon which they depend, before the contingency happens, whereby they become vested. Therefore, when there is tenant for life, with divers remainders in contingency, he may, not only by his death

but by alienation, surrender, or other methods, destroy and determine his own life-estate before any of those remainders vest; the consequence of which is that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life estate, he by that means defeats the remainder in tail to his son: for his son, not being *in esse* when the particular estate determined, the remainder could not then vest; and as it could not vest then, by the rules before laid down, it never can vest at all. In these cases, therefore, it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If, therefore, his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect and become a particular estate in possession, sufficient to support the remainders depending in contingency. This method is said to have been invented by Sir Orlando Bridgman, Sir Geoffrey Palmer, and other eminent counsel, who betook themselves to conveyancing during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life: and when after the restoration, these gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use.

Thus the student will observe how much nicety is required in creating and securing a remainder; and I trust he will in some measure see the general reasons upon which this nicety is founded. It were endless to attempt to enter upon the particular subtleties and refinements into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided; neither are they consonant to the design of these elementary disquisitions. I must not, however, omit, that in devises by last will and testament (which being often drawn up when the party is *inops consilii* (without counsel) are always more favored in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice; in these devises, I say, remainders may be

created in some measure contrary to the rules before laid down, though our lawyers will not allow such dispositions to be strictly remainders, but call them by another name, that of executory devises, or devises hereafter to be executed. [See also Springing and Shifting Uses, *supra.*]

8. Executory interests, and limitations, the rule against perpetuities.—An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the devisor, but only on some future contingency. It differs from a remainder in three very material points: (1) That it needs not any particular estate to support it; (2) That by it a fee-simple, or other less estate, may be limited after fee-simple; (3) That by this means a remainder may be limited of a chattel interest after particular estate for life created in the same.

(1) The first act happens when a man devises a future estate to arise upon a contingency, and till that contingency happens does not dispose of the fee-simple but leaves it to descend to his heirs at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage; here is in effect a contingent remainder without any particular estate to support it; a freehold commencing *in futuro.* This limitation, though it would be void in a deed, yet is good in a will by way of executory devise. For, since by a devise a freehold may pass without corporal tradition or livery of seisin (as it must do if it passes at all), therefore it may commence *in futuro;* because the principle reason why it cannot commence *in futuro* in other cases is the necessity of actual seisin, which always operates *in præsenti.* And, since it may thus commence *in futuro,* there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows that such an executory devise, not being a present interest, cannot be barred by a recovery, suffered before it commences.

By executory devise a fee, or other less estate, may be limited after a fee. And this happens where a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A and his heirs; but if he dies before the age of twenty-one, then to B and his heirs; this remainder, though void in deed, is good by way of executory devise.

Rule against perpetuities. But in both these species of executory devises the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years, for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors, because by perpetuities (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation), estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme-covert, as shall first attain the age of twenty-one, and his heirs, the utmost length of time that can happen before the estate can vest is the life of the mother and the subsequent infancy of her son; and this has been decreed to be a good executory devise.

(3) By executory devise a term of years may be given to one man for his life and afterwards limited over in remainder to another, which could not be done by deed; for by law the first grant of it to a man for life was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term of years. And, at first, the courts were tender, even in the case of a will, of restraining the devisee for life from aliening the term; but only held, that in case he died without exerting that act of ownership the remainder over should then take place, for the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. But, soon afterwards, it was held that the devisee for life hath no power of aliening the term so as to bar the remainder-man, yet in order to prevent the danger of perpetuities it was settled that though such remainders may be limited to as many persons successively as the devisor thinks proper, yet they must all be *in esse* during the life of the first devisee, for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest, and it was also settled that such remainder may not be limited to take effect, unless

upon such contingency as must happen (if at all) during the life of the first devisee.

Thus much for such estates in expectancy, as are created by the express words of the parties themselves; the most intricate title in the law. There is yet another species, which is created by the act and operation of the law itself, and this is called a reversion.

9. Estates in reversion.—An estate in reversion is the residue of an estate left in the grantor to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke describes a reversion to be the returning of the land to the grantor or his heirs after the grant is over. As if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law, and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere, and if he who was before possessed of the whole, carves out of it any smaller estate and grants it away, whatever is not so granted remains in him.

Distinctions between reversion and remainders. A reversion is never, therefore, created by deed or writing, but arises from construction of law; a remainder can never be limited unless by either deed or devise. But both are equally transferable when actually vested, being both estates in præsenti, though taking effect in futuro.

The doctrine of reversions is plainly derived from the feudal constitution. For, when a feud was granted to a man for life, or to him and his issue male, rendering either rent or other services, then on his death or the failure of issue male the feud was determined and resulted back to the lord or proprietor, to be again disposed of at his pleasure.

Incidents of. And hence the usual incidents to reversions are said to be fealty and rent. When no rent is reserved on the particular estate, fealty, however, results of course, as an incident quite inseparable and may be demanded as a badge of tenure or acknowledgment of superiority, being frequently the only evidence that the lands are holden at all. Where rent is reserved it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the

rent, by special words, but by a general grant of the reversion the rent will pass with it, as incident thereto; though by the grant of the rent generally the reversion will not pass. The incident passes by the grant of the principal, but not *e converso,* for the maxim of the law is, *"accessorium non ducit, sed sequitur, suum principale"* (the accessory does not precede but follows his principal).

These incidental rights of the reversioner and the respective modes of descent in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one seized of a paternal estate in fee makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion to which rent and fealty shall be incident; and which shall only descend to the heirs of his father's blood and to his heirs general as a remainder limited to him by a third person would have done, for it is the old estate which was originally in him and never yet was out of him. And so likewise if a man grants a lease for life to A, reserving rent, with reversion to B and his heirs, B hath a remainder descendible to his heirs general and not a reversion to which the rent is incident, but the grantor shall be entitled to the rent during the continuance of A's estate.

Merger. Before we conclude the doctrine of remainders and reversions, it may be proper to observe that whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated; or, in the law phrase, it is said to be merged, that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance and shall never exist any more. But they must come to one and the same person in one and the same right, else if the freehold be in his own right and he has a term in right of another *(en auter droit),* there is no merger.

PART VII

LAW OF DOMESTIC AND BUSINESS RELATIONS

CHAPTER XXXII.

HUSBAND AND WIFE.

1. Private relations classified.—The method I have marked out now leads me to consider the rights and duties of persons in private economical relations.

The three great domestic relations are, (1) That of husband and wife; which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. (2) That of parent and child, which is consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated. But since the parents, on whom this care is primarily incumbent, may be snatched away by death before they have completed their duty, the law has therefore provided a third relation; (3) That of guardian and ward, which is a kind of artificial parentage, in order to supply the deficiency, whenever it happens, of the natural.

Business relations. [Business relationship, by which men associate themselves together for business purposes, comprise, (1) The relation of master and servant, and principal and agent; (2) Partnership; and (3) Corporations, by which men combine their labor, skill, and capital in various lines of business.]

2. How marriage relation formed.—The first private relation of persons is that of marriage, which includes the reciprocal rights and duties of husband and wife; or, most of our elder law books call them, of *baron* and *feme*. In the consideration of which I shall in the first place inquire, how marriages may be

contracted or made; shall next point out the manner in which they may be dissolved; and shall, lastly, take a view of the legal effects and consequences of marriage.

Our law considers marriage in no other light than as a civil contract. And, taking it in this civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and, lastly, actually did contract, in the proper forms and solemnities required by law.

Assent of parties. First they must be willing to contract. "*Consensus non concubitus, facit nuptias*" (consent, not cohabitation, makes the marriage), is the maxim of the civil law in this case: and it is adopted by the common lawyers, who indeed have borrowed, especially in ancient times, almost all their notions of the legitimacy of marriage from the canon and civil laws.

Capacity of parties. Secondly, they must be able to contract. In general, all persons are able to contract themselves in marriage, unless they labor under some particular disabilities and incapacities. What those are it will be here our business to inquire.

3. **Canonical disabilities.**—Now these disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these in our law only make the marriage voidable, and not ipso facto void, until sentence of nullity be obtained. Of this nature are consanguinity, or relation by blood; and affinity, or relation by marriage; and some particular corporal infirmities. And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducible from thence: it therefore being sinful in the persons who labor under them, to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion; in order to separate the offenders, and inflict penance for the offence, *pro salute animarum* (for the health of their souls).

But such marriages not being void *ab initio* (from the beginning), but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is

actually made during the life of the parties. For after the death of either of them, the courts of common law will not suffer the spiritual court to declare such marriages to have been void; because such declaration cannot now tend to the reformation of the parties. And therefore when a man had married his first wife's sister, and after her death the bishop's court was proceeding to annul the marriage and bastardize the issue, the court of king's bench granted a prohibition quoad hoc; but permitted them to proceed to punish the husband for incest. These canonical disabilities being entirely the province of the ecclesiastical courts, our books are perfectly silent concerning them. [This disability has been removed by statute.]

4. Civil disabilities.—The other sort of disabilities are those which are created, or at least enforced, by the municipal laws. And though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offence, as on account of the civil inconveniencies they draw after them. These civil disabilities make the contract void *ab initio,* and not merely voidable; not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all: they do not put asunder those who are joined together, but they previously hinder the junction. And, if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial union.

(1) *Impediments.* The first of these legal disabilities is a prior marriage, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void: polygamy being condemned both by the law of the New Testament, and the policy of all prudent states, especially in these northern climates. And Justinian, even in the climate of modern Turkey, is express, that "*duas uxores eodem tempore habere non licet*" (it is not lawful to have two wives at one time).

(2) *Age.* The next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; *a fortiori* therefore it ought to avoid this, the most important contract of any. Therefore if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect;

and, when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law. But the canon law pays a greater regard to the constitution, than the age, of the parties; for if they are *habiles ad matrimonium* (fit for marriage), it is a good marriage, whatever their age may be. And in our law it is so far a marriage, that, if at the age of consent they agree to continue together, they need not be married again.

5. Formalities of celebration.—Lastly, the parties must not only be willing and able to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made, *per verba de presenti,* or in words of the present tense, and in case of cohabitation *per verba de futuro* (by words of the future tense) also, between persons able to contract, was before the late act deemed a valid marriage to many purposes; and the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiæ* (in the face of the church). But these verbal contracts are now of no force, to compel a future marriage.

6. Dissolution of marriage.—I am next to consider the manner in which marriages may be dissolved; and this is either by death, or divorce, or annulment.

There are two kinds of divorce, the one total, the other partial; the one *a vinculo matrimonii* (from the bond of matrimony), the other merely *a mensa et thoro* (from bed and board). [By the ecclesiastical law a valid marriage once contracted was almost indissoluble. Divorce, in our sense of that term, the dissolution of a once valid marriage for causes arising after its formation, was given only by act of parliament.]

Annulment of marriage. The total divorce, *a vinculo matrimonii,* must be for some of the canonical causes of impediment before mentioned, and those, existing before the marriage, as is always the case in consanguinity; not supervenient, or arising afterwards, as may be the case in affinity or corporal imbecility. For in case of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio:* and the parties are therefore separated *pro salute animarum* (for the welfare of their souls): for which reason, as was before observed, no divorce can be obtained, but during the life of the parties. The

issue of such marriage as is thus entirely dissolved, are bastards.

Separation from bed and board. Divorce *a mensa et thoro* is when the marriage is just and lawful *ab initio,* and therefore the law is tender of dissolving it; but, for some supervenient cause, it becomes improper or impossible for the parties to live together: as in the case of intolerable ill temper, or adultery, in either of the parties. For the canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any other cause whatsoever, that arises after the union is made. And this is said to be built on the divine revealed law; though that expressly assigns incontinence as a cause, and indeed the only cause, why a man may put away his wife and marry another. The civil law, which is partly of pagan origin, allows many causes of absolute divorce: and some of them pretty severe ones: as, if a wife goes to the theater, or the public games, without the knowledge and consent of the husband; but among them adultery is the principal, and with reason named the first. But with us in England adultery is only a cause of separation from bed and board: for which the best reason that can be given, is, that if divorces were allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties, which is now prohibited by the canons. However, divorces *a vinculi matrimonii* (from the bond of matrimony), for adultery, have, of late years, been frequently granted by act of parliament.

Alimony. In case of divorce *a mensa et thoro,* the law allows alimony to the wife, which is that allowance which is made to a woman for her support out of the husband's estate: being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called her estovers, for which, if he refuses payment, there is, besides the ordinary process of excommunication, a writ at common law *de estoveriis habendis* (of recovering estovers), in order to recover it. It is generally proportioned to the rank and quality of the parties. But in case of elopement, and living with an adulterer, the law allows her no alimony. No alimony

will be assigned in case of a divorce for adultery on her part; for as that amounts to a forfeiture of her dower after his death, it is also a sufficient reason why she should not be a partaker of his estates when living.

Summary. Divorces are causes thoroughly matrimonial, and cognizable by the ecclesiastical judge. If it becomes improper, through some supervenient cause arising *ex post facto* (after the fact), that the parties should live together any longer; as through intolerable cruelty, adultery, a perpetual disease, and the like; this unfitness or inability for the marriage state may be looked upon as an injury to the suffering party: and for this ecclesiastical law administers the remedy of separation, or a divorce *a mensa et thoro* (from bed and board). But if the cause existed previous to the marriage, and was such a one as rendered the marriage unlawful *ab initio,* as consanguinity, corporal imbecility, or the like; in this case the law looks upon the marriage to have been always null and void, being contracted *in fraudem legis,* and decrees not only a separation from bed and board, but *a vinculo matrimonii* itself.

7. **Effect of marriage on capacity of parties.**—Having thus shown how marriages may be made or dissolved, I come now, lastly, to speak of the legal consequences of such making, or dissolution.

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a *feme-covert, fœmina viro co-operta;* she is said to be *covert-baron,* or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

Husband's contracts with wife void. For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her would be only to covenant with himself: and therefore it is also generally true, that all compacts made

between husband and wife, when single, are voided by the intermarriage.

Husband must be joined in suits. If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own: neither can she be sued without making the husband a defendant. There is indeed one case where the wife shall sue and be sued as a feme sole, viz.: where the husband has abjured the realm, or is banished, for then he is dead in law: and, the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy, or could make no defense at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately; for the union is only a civil union.

Incapacity as to deeds, wills, and crimes. But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary.

She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion. And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her: but this extends not to treason or murder.

Husband and wife incompetent witnesses for or against the other. But in trials of any sort they are not allowed to be evidence for, or against, each other: partly because it is impossible their testimony should be indifferent, but principally because of the union of person; and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, "*nemo in propria causa testis esse debet*" (no one should be a witness in his own cause); and if against each other, they would contradict another maxim, "*nemo tenetur seipsum accusare*" (no one is bound to accuse himself). But where the offence is directly against the person of the wife, this rule has been usually dispensed with.

8. Effect of marriage on wife's property at common law.—By marriage, those chattels which belonged formerly to the wife, are by act of law vested in the husband with the same degree of property and with the same powers, as the wife, when sole, had over them. This depends entirely on the notion of an unity of person between the husband and wife; it being held that they are one person in law, so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In real estate, he only gains a title to the rents and profits during coverture; for that, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs if she dies before him; unless by the birth of a child, he becomes tenant for life by the curtesy. But in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them: for unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined.

Certain chattels must be reduced to possession by husband. There is therefore a very considerable difference in the acquisition of this species of property by the husband, according to the subject matter; viz., whether it be a chattel real or chattel personal; and of chattels personal, whether it be in possession or in action only.

9. Duties and authority of husband.—If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. The husband is bound to provide his wife with necessaries by law, as much as himself; and, if she contracts debts for them, he is obliged to pay them; but for anything besides necessaries he is not chargeable. Also if a wife elopes, and lives with another man, the husband is not chargeable even for necessaries; at least if the person who furnishes them is sufficiently apprised of her elopement.

Husband's authority. The husband also, by the old law, might give his wife moderate correction. For, as he is to answer

for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet* (otherwise than lawfully and reasonable belongs to the husband for the due government and correction of his wife). The civil law gave the husband the same, or a larger, authority over his wife: allowing him, for some misdemeanors, *flagellis et fustibus acriter verberare uxorem* (to beat his wife severely with scourges and sticks); for others, only *modican castigationem adhibere* (to use moderate chastisement). But with us, in the politer reign of Charles the Second, this power of correction began to be doubted; and a wife may now have security of the peace against her husband; or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior.

These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favorite is the female sex of the laws of England.

CHAPTER XXXIII.

PARENT AND CHILD; GUARDIAN AND WARD; INFANTS.

1. **Legitimacy.**—The next, and the most universal relation in nature, is immediately derived from the preceding, being that between parent and child. Children are of two sorts; legitimate, and spurious or bastards, each of which we shall consider in their order; and, first, of legitimate children. A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards. *"Pater est quem nuptiæ demonstrant"* (the nuptials shew who is the father), is the rule of the civil law; and this holds with the civilians, whether the nuptials happen before or after the birth of the child. With us in England the rule is narrowed, for the nuptials must be precedent to the birth; of which more will be said when we come to consider the case of bastardy. At present, let us inquire into, (1) The legal duties of parents to their legitimate children; (2) Their power over them; (3) The duties of such children to their parents.

2. **Parental duty of support as founded in natural law.**—And, first, the duties of parents to legitimate children: which principally consist in three particulars; their maintenance, their protection, and their education. The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect right of receiving maintenance from the parents. And the president Montesquieu has a very just observation upon this head: that the establishment of marriage in all civilized states is

built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfil this obligation; whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way, shame, remorse, the constraint of her sex, and the rigor of laws, that stifle her inclinations to perform this duty; and, besides, she generally wants ability.

The municipal laws of all well-regulated states have taken care to enforce this duty; though Providence has done it more effectually than any laws, by implanting in the breast of every parent that natural and insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.

3. Provision for children by will.—The civil law obliges the parent to provide maintenance for his child; and, if he refuses, "*judex de ea re cognoscet*" (the judge shall take cognizance of that matter). Nay, it carries this matter so far, that it will not suffer a parent at his death totally to disinherit his child without expressly giving his reason for so doing; and there are fourteen such reasons reckoned up, which may justify such disinherison. If the parent alleged no reason, or a bad or a false one, the child might set the will aside, *tanquam testamentum inofficiosum* (as an unkind will), a testament contrary to the natural duty of the parent. And it is remarkable under what color the children were to move for relief in such a case: by suggesting that the parent had lost the use of his reason when he made the inofficious testament. And this, as Puffendorf observes, was not to bring into dispute the testator's power of disinheriting his own offspring, but to examine the motives upon which he did it; and if they were found defective in reason, then to set them aside.

But perhaps this is going rather too far; every man has, or ought to have, by the laws of society, a power over his own property; and, as Grotius very well distinguishes, natural right obliges to give a necessary maintenance to children; but what is more than that they have no other right to, than as it is given them by the favor of their parents, or the positive constitutions of the municipal law.

Disinheriting permitted at common law. Our law has made no provision to prevent the disinheriting of children by will: leaving every man's property in his own disposal, upon a principle of liberty in this as well as every other action; though perhaps it had not been amiss if the parent had been bound to leave them at least a necessary subsistence. Indeed, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage articles. Heirs also, and children, are favorites of our courts of justice, and cannot be disinherited by any dubious or ambiguous words; there being required the utmost certainty of the testator's intentions to take away the right of an heir.

4. Maintenance—Defence and Education.—Let us next see what provision our own laws have made for this natural duty. It is a principle of law, that there is an obligation on every man to provide for those descended from his loins; and the manner in which this obligation shall be performed is thus pointed out. The father and mother, grandfather and grandmother of poor, impotent persons, shall maintain them at their own charges, if of sufficient ability, according as the quarter session shall direct. No person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident, and then is only obliged to find them with necessaries, the penalty on refusal being no more than 20*s.* a month. For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence; but thought it unjust to oblige the parent against his will, to provide them with superfluities and other indulgences of fortune: imagining they might trust to the impulse of nature, if the children were deserving of such favors.

Protection and defence. From the duty of maintenance we may easily pass to that of protection, which is also a natural duty, but rather permitted than enjoyed by any municipal laws; nature, in this respect, working so strongly as to need rather a check than a spur. A parent may by our laws maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defence of the persons of his children:

nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged his son's quarrel by beating the other boy, of which beating (a single blow with small cudgel not likely to cause death) he afterwards unfortunately died, it was not held to be murder, but manslaughter merely. Such indulgence does the law shew to the frailty of human nature and the workings of parental affection.

Education. The last duty of parents to their children is that of giving them an education suitable to their station in life; a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes, it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world; if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labor under those griefs and inconveniences which his family, so uninstructed, will be sure to bring upon him.

5. Parental authority.—The power of parents over their children is derived from the former consideration, their duty, this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it. And upon this score the municipal laws of some nations have given a much larger authority to the parents than others. The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away. But the rigor of these laws was softened by subsequent constitutions; so that we find a father banished by the Emperor Hadrian for killing his son, though he had committed a very heinous crime, upon this maxim, that *"patria potestas in pietate debet, non in atrocitate, consistere"* (paternal power should consist in kindness, not in cruelty). But still they maintain to the last a very large and absolute authority; for a son could not acquire any property of his own during the life

of his father; but all acquisitions belonged to the father, or at least the profits of them, for his life.

The power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education. The consent or the concurrence of the parent to the marriage of his child under age, was also directed by our ancient law to be obtained: but now it is absolutely necessary, for without it the contract is void. And this also is another means which the law has put into the parent's hands, in order the better to discharge his duty; first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages. A father has no other power over his son's estate than as his trustee or guardian; for though he may receive the profits during the child's minority, yet he must account for them when he comes of age. He may indeed have the benefit of his children's labor while they live with him and are maintained by him; but this is no more than he is entitled to from his apprentices or servants.

The legal power of a father, for a mother, as such is entitled to no power, but only to reverence and respect; the power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established, as some must necessarily be established, when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz.: that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

6. Filial duty.—The duties of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe subjection and obedience during our minority, and honor and reverence ever

after: they who protected the weakness of our infancy are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws. And the Athenian laws carried this principle into practice with a scrupulous kind of nicety: obliging all children to provide for their father when fallen into poverty: with an exception to spurious children, to those whose chastity had been prostituted by consent of the father, and to those whom he had not put in the way of gaining a livelihood. The legislature, says Baron Montesquieu, considered, that in the first case the father being uncertain, had rendered the natural obligation precarious; that in the second case he had sullied the life he had given, and done his children the greatest of injuries, in depriving them of their reputation; and that in the third case, he had rendered their life so far as in him lay, an unsupportable burthen, by furnishing them with no means of subsistence.

Our laws agree with those of Athens with regard to the first only of these particulars, the case of spurious issue. In the other cases the law does not hold the tie of nature to be dissolved by any misbehavior of the parent; and therefore a child is equally justifiable in defending the person, or maintaining the cause or suit, of a bad parent, as a good one; and is equally compellable, if of sufficient ability, to maintain and provide for a wicked and unnatural progenitor as for one who has shown the greatest tenderness and parental piety.

7. Illegitimates by civil and common law.—We are next to consider the case of illegitimate children, or bastards: with regard to whom let us inquire, (1) Who are bastards. (2) The legal duties of the parents towards a bastard child. (3) The rights and incapacities attending such bastard children. A bastard, by our English laws, is one that is not only begotten, but born, out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry: and herein they differ most materially from our law; which, though not so strict as to require that the child shall be begotten, yet makes it an indispensable condition to make it legitimate, that it shall be born, after lawful wedlock.

And the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage, taken in a civil light, abstractedly from any religious view, which has nothing to do with the legitimacy or illegitimacy of the children. The main end and design of marriage, therefore, being to ascertain and fix upon some certain person to whom the care, the protection, the maintenance, and the education of the children should belong: this end is, undoubtedly, better answered by legitimating all issue born after wedlock, than by legitimating all issue of the same parties, even born before wedlock, so as wedlock afterwards ensues: Because of the great uncertainty there will generally be, in the proof that the issue was really begotten by the same man; whereas, by confining the proof to the birth, and not to the begetting, our law has rendered it perfectly certain what child is legitimate, and who is to take care of the child: because by the Roman law a child may be continued a bastard, or made legitimate, at the option of the father and mother, by a marriage ex post facto; thereby opening a door to many frauds and partialities, which by our law are prevented. Whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature.

For, if a child be begotten while the parents are single, and they will endeavor to make an early reparation for the offence, by marrying within a few months after, our law is so indulgent as not to bastardize the child, if it be born, though not begotten in lawful wedlock; for this is an incident that can happen but once, since all future children will be begotten, as well as born, within the rules of honor and civil society. Upon reasons like these we may suppose the peers to have acted at the parliament of Merton, when they refused to enact that children born before marriage should be esteemed legitimate.

From what has been said, it appears, that all children born before matrimony are bastards by our law: and so it is of all children born so long after the death of the husband, that, by the usual course of gestation, they could not be begotten by him. But, this being a matter of some uncertainty, the law is not exact as to a few days.

8. **Choice of fathers.**—If a man dies, and his widow soon after marries again, and a child is born within such a time, as

that by the course of nature it might have been the child of either husband; in this case he is said to be more than ordinarily legitimate; for he may, when he arrives to years of discretion, choose which of the fathers he pleases. To prevent this, among other inconveniences, the civil law ordained that no widow should marry *infra annum luctus* (within the year of mourning), a rule which obtained so early as the reign of Augustus, if not of Romulus: and the same constitution was probably handed down to our early ancestors from the Romans, during their stay in this island; for we find it established under the Saxon and Danish governments.

9. **Presumption of legitimacy during wedlock.**—As bastards may be born before the coverture or marriage state is begun, or after it is determined, so also children born during wedlock may in some circumstances be bastards. As if the husband be out of the kingdom of England, or as the law somewhat loosely phrases it, *extra quatuor maria* (beyond the four seas), for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards. But, generally, during the coverture, access of the husband shall be presumed, unless the contrary can be shown; which is such a negative as can only be proved by showing him to be elsewhere; for the general rule is, *præsumitur pro legitimatione* (the presumption is in favor of legitimacy.) In a divorce *a mensa et thoro,* if the wife breeds children, they are bastards: for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved; but in a voluntary separation by agreement, the law will suppose access, unless the negative be shown. So also, if there is an apparent impossibility of procreation on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastards. Likewise, in case of divorce in the spiritual court, *a vinculo matrimonii,* all the issue born during the coverture are bastards; because such divorce is always upon some cause, that rendered the marriage unlawful and null from the beginning.

10. **Maintenance of bastards.**—Let us next see the duty of parents to their bastard children, by our law; which is principally that of maintenance. For, though bastards are not looked upon as children to any civil purpose, yet the ties of nature, of which maintenance is one, are not so easily dissolved:

and they hold indeed as to many other intentions; as, particularly, that a man shall not marry his bastard sister or daughter. The civil law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances, was neither consonant to nature nor reason, however profligate and wicked the parents might justly be esteemed.

Bastardy proceedings. The method in which the English law provides maintenance for them is as follows: When a woman is delivered, or declares herself with child, of a bastard, and will by oath before a justice of peace charge any person as having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child, or appear at the next quarter sessions to dispute and try the fact. But if the woman dies, or is married before delivery, or miscarries, or proves not to have been with child, the person shall be discharged; otherwise the sessions, or two justices out of sessions, upon original application to them, may take order for the keeping of the bastard, by charging the mother or the reputed father with the payment of money or other sustentation for that purpose. And if such putative father, or lewd mother, run away from the parish, the overseers, by direction of two justices, may seize their rents, goods and chattels, in order to bring up the said bastard child. Yet such is the humanity of our laws, that no woman can be compulsively questioned concerning the father of her child till one month after her delivery; which indulgence is, however, very frequently a hardship upon parishes, by giving the parents opportunity to escape.

11. **Incapacity of bastards to inherit.**—I proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody; and sometimes called *filius nullius* (the son of no one), sometimes *filius populi* (the son of the people). Yet he may gain a surname by reputation, though he has none by inheritance. The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for being *nullius filius,* he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. A bastard was also, in strictness, incapable of holy orders; and, though that were dispensed with, yet he was

utterly disqualified from holding any dignity in the church: but this doctrine seems now obsolete; and, in all other respects, there is no distinction between a bastard and another man. And really any other distinction, but that of not inheriting, which civil policy renders necessary, would with regard to the innocent offspring of his parents' crimes, be odious, unjust, and cruel to the last degree; and yet the civil law, so boasted of for its equitable decisions, made bastards, in some cases, incapable even of a gift from their parents. A bastard may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise; as was done in the case of John of Gant's bastard children, by a statute of Richard the Second.

12. Guardian and ward.—The only general domestic relation, now remaining to be discussed, is that of guardian and ward: which bears a very near resemblance to the last, and is plainly derived out of it; the guardian being only a temporary parent, that is, for so long time as the ward is an infant, or under age. In examining this species of relationship, I shall first consider the different kinds of guardians, how they are appointed, and their power and duty; next, the different ages of persons, as defined by the law; and lastly, the privileges and disabilities of an infant, or one under age and subject to guardianship.

The guardian with us performs the office both of the tutor (a teacher) and curator (a guardian) of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune; or, according to the language of the court of chancery, the tutor was the committee of the person, the curator the committee of the estate. But this office was frequently united in the civil law; as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept distinct.

13. Several species of guardians.—Guardians by nature are the father, and, in some cases, the mother of the child. For if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits. And, with regard to daughters, it seems by construction of the statute 4 and 5 Ph. and Mar., c. 8, that the father might by deed or will assign a guardian to any woman-child under the age of sixteen;

and if none be so assigned, the mother shall in this case be guardian. There are also guardians for nurture; which are, of course, the father and mother, till the infant attains the age of fourteen years; and in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education. Guardians for nurture continue only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian. This he may do, unless one be appointed by the father, by virtue of the statute 12 Car. II, c. 24, which, considering the imbecility of judgment in children of the age of fourteen, enacts that any father, under age or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant, either in possession or reversion, till such child attains the age of one and twenty years. These are called guardians by statute, or testamentary guardians.

14. Accounting and supervision of guardianship in chancery.—The power and reciprocal duty of a guardian and ward are the same, *pro tempore* (for a time), as that of a father and child; and therefore I shall not repeat them, but shall only add that the guardian, when the ward comes of age, is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence. In order therefore to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially, to indemnify themselves by applying to the court of chancery, acting under its direction, and accounting annually before the officers of that court. For the lord chancellor is, by rights derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns. In case therefore any guardian abuses his trust, the court will check and punish him; nay, sometimes will proceed to the removal of him, and appoint another in his stead.

15. Different capacities of minors at different ages.—Let us next consider the ward or person within age, for whose assistance and support these guardians are constituted by law; or who it is, that is said to be within age. The capacity of male

and female are different for different purposes. A male at twelve years old may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be an executor; and at twenty-one is at his own disposal, and may alien his lands, goods, and chattels. A female also at seven years of age may be betrothed or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at years of legal discretion, and may choose a guardian; at seventeen may be executrix; and at twenty-one may dispose of herself and her lands. So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth, who till that time is an infant, and so styled in law.

Sue by guardian ad litem or next friend. Infants have various privileges, and various disabilities: but their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name, of his guardian: for he is to defend him against all attacks as well by law as otherwise: but he may sue either by his guardian, or *prochein amy,* his next friend who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause; and it frequently happens, that an infant, by his *prochein amy,* institutes a suit in equity against a fraudulent guardian.

Criminal capacity. In criminal cases, an infant of the age of fourteen years may be capitally punished for any capital offence: but under the age of seven he cannot. The period between seven and fourteen is subject to much uncertainty: for the infant shall, generally speaking, be judged *prima facie* (on the first appearance) innocent; yet if he was *doli capax* (capable of deceit), and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion.

Exemption from statutes of limitation. With regard to estates and civil property, an infant hath many privileges which will

be better understood when we come to treat more particularly of those matters: but this may be said in general, that an infant shall lose nothing by non-claim, or neglect of demanding his right; nor shall any other laches or negligence be imputed to an infant, except in some very particular cases.

Contracts and conveyances of infant. It is generally true, that an infant can neither alien his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him. But still to all these rules there are some exceptions: part of which were just now mentioned in reckoning up the different capacities which they assume at different ages: and there are others, a few of which it may not be improper to recite, as a general specimen of the whole. And, first, it is true, that infants cannot alien their estates: but infant trustees, or mortgagees, are enabled to convey, under the direction of the court of chancery or exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court shall appoint.

An infant may also purchase lands, but his purchase is incomplete: for, when he comes to age, he may either agree or disagree to it, as he thinks prudent and proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement. It is, farther, generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable: yet in some cases he may bind himself apprentice by deed indented or indentures, for seven years; and he may by deed or will appoint a guardian to his children, if he has any. Lastly, it is generally true, that an infant can make no other contract that will bind him; yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries; and likewise for his good teaching and instruction whereby he may profit himself afterwards. And thus much at present, for the privileges and disabilities of infants.

PART VIII

LAW OF PROCEDURE—LEGAL, EQUITABLE ADMINISTRATIVE, AND CRIMINAL

CHAPTER XXXIV.

REMEDIES—JUDICIAL AND EXTRAJUDICIAL.

1. Redress of wrongs by self-help.—[Vengeance on the part of the person injured is the foundation of all legal redress. The early history of all political societies shows the same system of private revenge and self help for injuries. Moyle in speaking of the Roman law, says: "Before the establishment of a regular judicature, the injured person, with his kinsmen or dependants, made a foray against the wrongdoer, and swept away his cattle and with them his wife and children." 1 Moyle, Just Inst., p. 614. As Anglo-Saxon society slowly emerged from barbarism, blood feuds and private war were gradually restricted as in earlier civilizations, until the king or the state took over a complete administration of justice and the maintenance of the public peace. Kirgan v. Silvers, 13 Ind. App. 80, 91, 37 N. E. 413, 416.] The more effectually to accomplish redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws by which rights are defined and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice; that is, by civil suit or action. For which reason our chief employment in this Part will be to consider the redress of private wrongs, by suit or action in courts. But as there are certain injuries of such a nature, that some of them furnish, and others require a more speedy remedy than can be had in the ordinary forms of justice, there is allowed in those cases an unofficial or extrajudicial remedy which is ob-

tained by self-help or the mere act of the parties; of which I shall first treat, before I consider the procedure in seeking a remedy by suit or action in courts, which consists in the act of the parties co-operating with the act of law. And, first, of that redress of private injuries which is obtained by the mere act of the parties. This is of two sorts: first, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of all the parties together: both which I shall consider in their order.

2. **Self-defence.**—Of the first sort, or that which arises from the sole act of the injured party, is the defence of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens, is chargeable upon him only who began the affray. For the law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connection), makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law, particularly, it is held an excuse for breaches of the peace, nay even for homicide itself: but care must be taken, that the resistance does not exceed the bounds of mere defence and prevention; for then the defender would himself become an aggressor.

3. **Recaption or reprisal.**—This is another species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent,

or master, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace. The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants, concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If, therefore, he can so contrive it as to gain possession of his property again, without force or terror, the law favors and will justify his proceeding.

But, as the public peace is a superior consideration to any one man's private property; and as if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law.

4. **Entry on land.**—As recaption is a remedy given to the party himself, for an injury to his personal property, so, thirdly, a remedy of the same kind for injuries to real property, is by entry on lands and tenements, when another person without any right has taken possession thereof. This depends in some measure on like reasons with the former; and like that, too, must be peaceable and without force. Entry was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances. But this being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods, even of doing themselves justice; and much more if they have no justice in their claim.

So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force,

with violence, and unusual weapons. But this provision does not extend to such as endeavor to maintain possession by force, where they themselves have been in the peaceable enjoyment of the lands and tenements. In general, it is only where the original entry of the wrongdoer was unlawful that the ousted owner may make entry. But where an apparent right of possession has been gained under a lawful entry, the owner cannot enter, but is driven to his action to overthrow the apparent right. Yet a man may enter on his tenant on sufferance or tenant at will.

5. **Abatement of nuisance.**—A fourth species of remedy by the mere act of the party injured, is the abatement or removal of nuisances. What nuisances are, and their several species, we shall find a more proper place to inquire under some of the subsequent divisions. At present I shall only observe, that whatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed by the party aggrieved thereby, so as he commits no riot in the doing of it. If a house or wall is erected so near to mine that it stops my ancient lights, which is a private nuisance, I may enter my neighbor's land, and peaceably pull it down. Or if a new gate be erected across the public highway, which is a common nuisance, any of the king's subjects passing that way may cut it down and destroy it.

And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice.

6. **Distress.**—A fifth case, in which the law allows a man to be his own avenger, or to minister redress to himself, is that of distraining cattle or goods for non-payment of rent, or other duties; or distraining another's cattle damage-feasant, that is, doing damage, or trespassing, upon his land. The former intended for the benefit of landlords, to prevent from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to ascertain whose cattle they were that committed the trespass or damage. [This seizing of personal property as a pledge or security to compel the perform-

ance or satisfaction of a claim for rent or trespass of cattle, without the formal process of a suit or action, is a very ancient remedy which has gradually become almost obsolete and disused.]

These are the several species of remedies which may be had by the mere act of the party injured. I shall next briefly mention such as arise from the joint act of all the parties together. And these are only two: accord and arbitration.

7. **Accord and satisfaction.**—Accord is a method of satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar of all actions upon this account. As if a man contract to build a house or deliver a horse, and fail in it; this is an injury for which the sufferer may have his remedy by action, but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action.

8. **Arbitration and award.**—Arbitration is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more arbitrators; who are to decide the controversy: and if they do not agree, it is usual to add, that another person be called in as umpire (imperator, or *impar*), to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an award. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties, or the judgment of a court of justice.

9. **Judicial and non-judicial remedies concurrent.**—The next, and principal, object of our inquiries will be the redress of injuries by suit in courts: wherein the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument by which the parties are enabled to procure a certain and adequate redress.

And here it will not be improper to observe that although in the several cases of redress by the act of the parties mentioned the law allows an extrajudicial remedy, yet that does not exclude the ordinary course of justice; but it is only an additional weapon put into the hands of certain persons in particular

instances, where natural equity or the peculiar circumstances of their situation require a more expeditious remedy, than the formal process of any court of judicature can furnish. Therefore, though I may defend myself, or relations, from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods, if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action of trover or detinue: I may either enter on the lands, on which I have a right of entry, or may demand possession by a real action: I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may distrain for rent, or have an action of debt, at my own option; if I do not distrain my neighbor's cattle damage-feasant, I may compel him by action of trespass to make me a fair satisfaction. And with regard to accords and arbitrations, these in their nature being merely an agreement or compromise, most indisputably suppose a previous right of obtaining redress some other way: which is given up by such agreement.

10. Judicial remedies.—Now, since all wrong may be considered as merely a privation of right, the plain, natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded: or, where that is not possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages; as in case of assault, breach of contract, &c.: to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury; though such right be not fully ascertained till they are assessed by the intervention of the law. The instruments whereby this remedy is obtained (which are sometimes considered in the light of the remedy itself) are a diversity of suits and actions, which are defined by the Mirror to be "the lawful demand of one's right": or, as Bracton and Fleta express it, in the words of Justinian, *jus prosequendi in judicio quod alicui debetur* (the right of prosecuting to judgment which is due to everyone).

[The rigid system of fixed forms, or theories of action, and the particular theories of liability so applied by the common law

courts are to be considered in connection with the history of the substantive law of contracts, torts, and property, rather than with procedure.]

11. **Classes of actions.**—With us in England the several suits, or remedial instruments of justice, are from the subject of them distinguished into three kinds; actions personal, real and mixed.

Personal actions are such whereby a man claims a debt or personal duty, or damages in lieu thereof: and likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs: and they are the same which the civil law calls "*actiones in personam, quæ adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere*" (personal actions which are commenced against him who by contract or through the commission of some offence, is bound to give or surrender something). Of the former nature are all actions upon debt or promises. [Debt, Covenant, Assumpsit.] Of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like. [Trespass, Case, Trover, Detinue, Replevin.]

Real actions (or, as they are called in the Mirror, feudal actions), which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life. By these actions formerly all disputes concerning real estates were decided: but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management; and the inconvenient length of their process: a much more expeditious method of trying title being since introduced by other actions personal and mixed.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained. As, for instance, an action of waste, which is brought by him who hath the inheritance, in remainder or reversion, against the tenant for life, who hath committed waste therein, to recover not only the land wasted, which would make it really a real action; but also treble damages, in pursuance of the statute of Gloucester, which is a per-

sonal recompense; and so both being joined together, denominate it a mixed action. [Ejectment may also be classed as a mixed action and is now the only one of practical importance.]

Under these three heads may every species of remedy by suit or action in the courts of common law be comprised.

12. Limitation of actions.—[Legal remedies must be sought with reasonable promptitude within the time limited by the Statutes of Limitation.]

In real actions. This, by the statute of 32 Hen. VIII, c. 2, in a writ of right, is sixty years: in assizes, writs of entry, or other possessory actions real, of the seisin of one's ancestors, in lands; and either of their seisin, or one's own, in rents, suits and services, fifty years: and in actions real for lands grounded upon one's own seisin or possession, such possession must have been within thirty years. By the statute 21 Jac. I, c. 16, twenty years is the time of limitation in every action of ejectment, for no ejectment can be brought unless where the lessor of the plaintiff is entitled to enter on the lands, and by statute 21 Jac. I, c. 16, no entry can be made by any man, unless within twenty years after his right shall accrue.

Personal actions. Also, all actions of trespass (*quare clausum fregit*, or otherwise), detinue, trover, replevin, account, and case (except upon accounts between merchants), debt on simple contract, or for arrears of rent, are limited by the statute last mentioned to six years after the cause of action commenced: and actions of assault, menace, battery, mayhem, and imprisonment, must be brought within four years, and actions for words within two years after the injury committed.

Penal and criminal actions. And by statute 31 Eliz. c. 5, all suits, indictments, and informations upon any penal statutes, where any forfeiture is to the crown alone, shall be sued within two years; and where the forfeiture is to a subject, or to the crown and a subject, within one year after the offence committed, unless where any other time is specially limited by the statute. Lastly, by statute 10 & 11 Wm. III, c. 14, no writ of error, scire facias, or other suit, shall be brought to reverse any judgment, fine, or recovery, for error, unless it be prosecuted within twenty years.

Policy of the statutes. The use of these statutes of limitation is to preserve the peace of the kingdom, and to prevent those

innumerable perjuries which might ensue if a man were allowed to bring an action for any injury committed at any distance of time. Upon both these accounts the law therefore holds, that *"interest reipublicæ ut sit finis litium"* (it is for the public good that there be an end to contentions): and upon the same principle the Athenian laws in general prohibited all actions where the injury was committed five years before the complaint was made. If, therefore, in any suit, the injury or cause of action happened earlier than the period expressly limited by law, the defendant may plead the statutes of limitations in bar; as upon an *assumpsit,* or promise to pay money to the plaintiff, the defendant may plead *non assumpsit infra sex annos;* he made no such promise within six years; which is an effectual bar to the complaint.

13. Causes of uncertainty in legal remedies.—The uncertainty of legal proceedings is a notion so generally adopted, and has so long been the standing theme of wit and good humor, that he who should attempt to refute it would be looked upon as a man who was either incapable of discernment himself, or else meant to impose upon others. Yet it may not be amiss, before we enter upon the several modes whereby to be obtained in our courts of justice, to inquire a little wherein this uncertainty, so frequently complained of, consists; and to what causes it owes its original.

It hath sometimes been said to owe its original to the number of our municipal constitutions, and the multitude of our judicial decisions; which occasion, it is alleged, abundance of rules that militate and thwart with each other, as the sentiments or caprice of successive legislatures and judges have happened to vary. The fact of multiplicity is allowed; and that thereby the researches of the student are rendered more difficult and laborious; but that, with proper industry, the result of those inquiries will be doubt and indecision, is a consequence that cannot be admitted. People are apt to be angry at the want of simplicity in our laws; they mistake variety for confusion, and complicated cases for contradictory.

The occasion for law-suits. But is not (it will be asked) the multitude of law-suits, which we daily see and experience, an argument against the clearness and certainty of the law itself? By no means: for among the various disputes and controversies

which are daily to be met with in the course of legal proceedings, it is obvious to observe how very few arise from obscurity in the rules or maxims of law. An action shall seldom be heard of, to determine a question of inheritance, unless the fact of the descent be controverted. But the dubious points which are usually agitated in our courts, arise chiefly from the difficulty there is of ascertaining the intention of individuals, in their solemn dispositions of property; in their contracts, conveyances, and testaments. It is an object, indeed, of the utmost importance in this free and commercial country, to lay as few restraints as possible upon the transfer of possessions from hand to hand, or their various designations marked out by the prudence, convenience, necessities, or even by the caprice of their owners; yet to investigate the intention of the owner is frequently matter of difficulty, among heaps of entangled conveyances or wills of a various obscurity. The law rarely hesitates in declaring its own meaning; but the judges are frequently puzzled to find out the meaning of others. Thus the powers, the interest, the privileges, and the properties of a tenant for life, and a tenant in tail, are clearly distinguished and precisely settled by law: but what words in a will shall constitute this or that estate, has occasionally been disputed for more than two centuries past, and will continue to be disputed as long as the carelessness, the ignorance, or singularity of testators shall continue to clothe their intentions in dark or new-fangled expressions.

Facts, not law, generally doubtful. But notwithstanding so vast an accession of legal controversies, arising from so fertile a fund as the ignorance and wilfulness of individuals, these will bear no comparison in point of number to those which are founded upon the dishonesty, and disingenuity of the parties: by either their suggesting complaints that are false in fact, and thereupon bringing groundless actions; or by their denying such facts as are true, in setting up unwarrantable defences. *Ex facto oritus jus* (law arises from fact): if therefore the fact be perverted or misrepresented, the law which arises from thence will unavoidably be unjust or partial. And, in order to prevent this, it is necessary to set right the fact, and establish the truth contended for, by appealing to some mode of probation or trial, which the law of the country has ordained for a criterion of truth and falsehood.

These modes of probation or trial form in every civilized country the great object of judicial decisions. And experience will abundantly show, that above a hundred of our law-suits arise from disputed facts, for one where the law is doubted of. About twenty days in the year are sufficient in Westminster hall to settle (upon solemn argument) every demurrer, or other special point of law that arises throughout the nation: but two months are annually spent in deciding the truth of facts, before six distinct tribunals, in the several circuits of England: exclusive of Middlesex and London, which afford a supply of causes much more than equivalent to any two of the largest circuits.

14. Defence of common law procedure.—We shall now examine the method and progress of obtaining remedies in the courts of justice: proceeding from the first general complaint or original writ, through all stages of process, to compel the defendant's appearance; and of pleading, or formal allegation on the one side, and excuse or denial on the other; with the examination of the validity of such complaint or excuse, upon demurrer; or the truth of the facts alleged and denied, upon issue joined, and its several trials; to the judgment or sentence of the law, with respect to the nature and amount of the redress to be specifically given: till after considering the suspension of that judgment by writs in the nature of appeals, we shall have arrived at its final execution; which puts the party in specific possession of his right by the intervention of ministerial officers, or else gives him an ample satisfaction, either by equivalent damages, or by the confinement of his body who is guilty of the injury complained of.

The law's delays. This care and circumspection in the law—in providing that no man's right shall be affected by any legal proceeding without giving him previous notice, and yet that the debtor shall not by receiving such notice take occasion to escape from justice; in requiring that every complaint be accurately and precisely ascertained in writing, and be as pointedly and exactly answered; in clearly stating the question either of law or of fact; in deliberately resolving the former after full argumentative discussion, and indisputably fixing the latter by a diligent and impartial trial; in correcting such errors as may have arisen in either of those modes of decision, from accident, mistake, or surprise; and in finally enforcing the judgment, when

nothing can be alleged to impeach it;—this anxiety to maintain and restore to every individual the enjoyment of his civil rights, without intrenching upon those of any other individual in the nation, this parental solicitude which pervades our whole legal constitution, is the genuine offspring of that spirit of equal liberty which is the singular felicity of Englishmen. At the same time it must be owned to have given a handle, in some degree, to those complaints of delay in the practice of the law, which are not wholly without foundation, but are greatly exaggerated beyond the truth. There may be, it is true, in this, as in all other departments of knowledge, a few unworthy professors: who study the science of chicane and sophistry rather than of truth and justice; and who to gratify the spleen, the dishonesty, and wilfulness of their clients, may endeavor to screen the guilty, by an unwarrantable use of those means which were intended to protect the innocent.

Technicalities historically guard liberty. Yet some delays there certainly are, and must unavoidably be, in the conduct of a suit, however desirous the parties and their agents may be to come to a speedy determination. These arise from the same original causes as were mentioned in examining a former complaint: from liberty, property, civility, commerce, and an extent of populous territory: which, whenever we are willing to exchange for tyranny, poverty, barbarism, idleness and a barren desert, we may then enjoy the same dispatch of causes that is so highly extolled in some foreign countries. But common sense and a little experience will convince us that more time and circumspection are requisite in causes, where the suitors have valuable and permanent rights to lose, than where their property is trivial and precarious, and what the law gives them to-day, may be seized by their prince to-morrow. In Turkey, says Montesquieu, where little regard is shown to the lives or fortunes of the subject, all causes are quickly decided: the basha, on a summary hearing, orders which party he pleases to be bastinadoed, and then sends them about their business. But in free states, the trouble, expense, and delays of judicial proceedings are the price that every subject pays for his liberty; and in all governments, he adds, the formalities of law increase in proportion to the value which is set on the honor, the fortune, the liberty, and life of the subject.

15. Conservative methods of reforming procedure.—But this intricacy of our legal process will be found, when attentively considered, to be one of those troublesome, but not dangerous evils, which have their root in the frame of our constitution, and which, therefore, can never be cured, without hazarding every thing that is dear to us. In absolute governments, when new arrangements of property and a gradual change of manners have destroyed the original ideas on which the laws were devised and established, the prince by his edict may promulge a new code more suited to the present emergencies. But when laws are to be framed by popular assemblies, even of the representative kind, it is too herculean a task to begin the work of legislation afresh, and extract a new system from the discordant opinions of more than five hundred counsellors. A single legislator, or an enterprising sovereign, a Solon or Lycurgus, a Justinian or a Frederick, may at any time form a concise, and perhaps an uniform, plan of justice: and evil betide that presumptuous subject who questions its wisdom or utility. But who, that is acquainted with the difficulty of new-modelling any branch of our statute laws (though relating but to roads or to parish settlements), will conceive it ever feasible to alter any fundamental point of the common law, with all its appendages and consequents, and set up another rule in its stead?

Gradual adaptations. When, therefore, by the gradual influence of foreign trade and domestic tranquillity, the spirit of our military tenures began to decay, and at length the whole structure was removed, the judges quickly perceived that the forms and delays of the old feudal actions (guarded with their several outworks of essoins, vouchers, aid-prayers, and a hundred other formidable intrenchments) were ill-suited to that more simple and commercial mode of property which succeeded the former, and required a more speedy decision of right, to facilitate exchange and alienation. Yet they wisely avoided soliciting any great legislative revolution in the old established forms, which might have been productive of consequences more numerous and extensive than the most penetrating genius could foresee; but left them as they were to languish in obscurity and oblivion, and endeavored, by a series of minute contrivances, to accommodate such personal actions as were then in use to all the most useful purposes of remedial justice: and where, through the dread of

innovation, they hesitated at going so far as perhaps their good sense would have prompted them, they left an opening for the more liberal and enterprising judges, who have sat in our courts of equity, to show them their error by supplying the omissions of the courts of law.

And, since the new expedients have been refined by the practice of more than a century, and are sufficiently known and understood, they in general answer the purpose of doing speedy and substantial justice, much better than could now be effected by any great fundamental alterations. The only difficulty that attends them arises from their fictions and circuities; but, when once we have discovered the proper clue, that labyrinth is easily pervaded. Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.

CHAPTER XXXV.

THE HISTORIC JUDICIAL SYSTEM OF ENGLAND.

1. **Courts in general.**—It is a fundamental maxim, *ubi jus, ibi remedium,* that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded. And in treating of these remedies by suit in courts, I shall pursue the following method: first, I shall consider the nature and several species of courts of justice; and, secondly, I shall point out in which of these courts, and in what manner, the proper remedy may be had for any private injury, or, in other words, what injuries are cognizable, and how redressed, in each respective species of courts. First, then, of courts of justice. And herein we will consider, first, their nature and incidents in general; and then, the several species of them, erected and acknowledged by the laws of England.

A court is defined to be a place wherein justice is judicially administered. For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious variety of courts, some with a more limited, others with a more extensive, jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review. All these in their turns will be taken notice of in their respective places: and I shall therefore here only mention one distinction, that runs throughout them all, viz.: that some of them are courts of record, others not of record.

A court of record is that, where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question.

In every court there must be at least three constituent parts, the *actor, reus,* and *judex;* the *actor,* or plaintiff, who complains of an injury done; the *reus,* or defendant, who is called upon to

make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain and, by its officers, to apply the remedy. It is also usual in the superior courts to have attorneys and advocates, or counsel, as assistants.

2. Attorneys and counsel.—An attorney-at-law answers to the procurator, or proctor, of the civilians and canonists. And he is one who is put in the place, stead, or turn of another, to manage his matters of law. Formerly every suitor was obliged to appear in person to prosecute or defend his suit unless by special license under the king's letters patent. These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster Hall; and are in all points officers of the respective courts in which they are admitted; and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges. No man can practice as an attorney in any of those courts, but such as is admitted, and sworn an attorney of that particular court: an attorney of a court of king's bench cannot practice in the court of common pleas; nor vice versa. To practice in the court of chancery it is also necessary to be admitted a solicitor therein.

Barristers and serjeants. Of advocates, or (as we generally call them) counsel, there are two species or degrees; barrister, and serjeants. The former are admitted after a considerable period of study, or at least standing, in the inns of court; and are in our old books styled apprentices, *apprenticii ad legem* (apprentices to the law), being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years standing; at which time, according to Fortescue, they might be called to the state and degree of serjeants, or *servientes ad legem* (serjeants at law). How ancient and honorable this state and degree is, with the form, splendor, and profits attending it, hath been so fully displayed by many learned writers, that it need not be here enlarged on. I shall only observe, that serjeants at law are bound by a solemn oath to do their duty to their clients, and that by custom the judges of the courts of Westminster are always admitted into this venerable order, before they are advanced to the bench; the original of

which was probably to qualify the puisne barons of the exchequer to become justices of assize, according to the exigence of the statute of 14 Edw. III, c. 16.

Rank of king's counsel. From both these degrees some are usually selected to be his majesty's counsel learned in the law; the two principal of whom are usually called his attorney, and solicitor general. The first king's counsel, under the degree of serjeant, was Sir Francis Bacon, who was made so *honoris causa* (as a mark of honor), without either patent or fee. A custom has of late years prevailed of granting letters patent of precedence to such barristers as the crown thinks proper to honor with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective patents; sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being. These (as well as the queen's attorney and solicitor-general), rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts; but receive no salaries, and are not sworn; and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately (except in the court of common pleas, where only serjeants are admitted) may take upon them the protection and defence of any suitors, whether plaintiff or defendant; who are therefore called their clients, like the dependents upon the ancient Roman orators. These indeed practiced gratis, for honor merely, or at most for the sake of gaining influence: and so likewise it is established with us, that a counsel can maintain no action for his fees; which are given, not as *locatio vel conductio,* but as *quiddam honorarium:* not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation: as is also laid down with regard to advocates in the civil law, whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80*l.* of English money.

3. The court of common pleas.—This is frequently termed the court of common bench. By the ancient Saxon constitution, there was only one superior court of justice in the kingdom; and that court had cognizance both of civil and spiritual causes, viz.: the *wittena-gemote,* or general council, which assembled annually or oftener, wherever the king kept his Christmas,

Easter, or Whitsuntide, as well to do private justice as to consult upon public business. At the Conquest the ecclesiastical jurisdiction was diverted into another channel; and the conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown.

The aula regis, or great council of the king. He therefore established a constant court in his own hall, thence called by Bracton and other ancient authors *curia regis,* or *aula regis* (the king's court or hall). This court was composed of the king's great officers of state resident in his palace, and usually attendant on his person. This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burthensome to the subject.

The common pleas established. Wherefore King John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of magna carta, and enacts that, "*communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo*" (let not the common pleas follow the king's court, but be held in some fixed place). This certain place was established in Westminster Hall, the place where the *aula regis* originally sat, when the king resided in that city; and there it has ever since continued. And the court being thus rendered fixed and stationary, the judges became so too, and a chief, with other justices of the common pleas, was thereupon appointed, with jurisdiction to hear and determine all pleas of land, and injuries merely civil, between subject and subject.

Pleas or suits are regularly divided into two sorts: pleas of the crown, which comprehend all crimes and misdemeanors, wherein the king (on behalf of the public) is the plaintiff; and common pleas, which include all civil actions, depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of king's bench; the latter of the court of common pleas; which is a court of record, and is styled by Sir Edward Coke the lock and key of the common law; for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought: and all other, or personal pleas between man and man, are like-

wise here determined; though in most of them the king's bench has also a concurrent authority.

The judges of this court are at present four in number, one chief and three puisne justices, created by the king's letters patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed and compounded of both. These it takes cognizance of, as well originally, as upon removal from the inferior courts before-mentioned. But a writ of error, in the nature of an appeal, lies from this court into the court of king's bench.

4. The king's bench.—The court of king's bench (so called because the king used formerly to sit there in person, the style of the court still being *coram ipso rege*) is the supreme court of common law in the kingdom: consisting of a chief justice and three puisne (younger) justices, who are by their office the sovereign conservators of the peace, and supreme coroners of the land. Yet, though the king himself used to sit in this court, and still is supposed so to do; he did not, neither by law is he empowered to, determine any cause or motion, but by the mouth of his judges, to whom he hath committed his whole judicial authority. This court (as we have said) is the remnant of the *aula or curia regis.*

The jurisdiction of the king's bench is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown-side or crown-office; the latter in the plea-side of the court. The jurisdiction of the crown-side it is not our present business to consider; that will be more properly discussed in the ensuing parts. But on the plea-side, or civil branch, it hath an original jurisdiction and cognizance of all actions of trespass.

Appellate jurisdiction. This court is likewise a court of appeal, into which may be removed by a writ of error all determinations of the court of common pleas, and of all inferior courts

of record in England; and to which a writ of error lies also from the court of king's bench in Ireland. Yet even this so high and honorable court is not the *dernier resort* (the last resort) of the subject; for, if he be not satisfied with any determination here, he may remove it by writ of error into the house of lords, or the court of exchequer chamber, as the case may happen, according to the nature of the suit, and the manner in which it has been prosecuted.

5. The exchequer.—The court of exchequer is inferior in rank not only to the court of king's bench, but to the common pleas also: but I have chosen to consider it in this order, on account of its double capacity, as a court of law and a court of equity also. It is a very ancient court of record, set up by William the Conqueror, as a part of the *aula regia*, though regulated and reduced to its present order by King Edward I; and intended principally to order the revenues of the crown, and to recover the king's debts and duties.

Jurisdiction now concurrent. By their original constitution the jurisdiction of the courts of common pleas, king's bench, and exchequer, was entirely separate and distinct; the common pleas being intended to decide all controversies between subject and subject; the king's bench to correct all crimes and misdemeanors that amount to a breach of the peace, the king being then plaintiff, as such offences are in open derogation of the *jura regalia* (regal rights) of his crown; and the exchequer to adjust and recover his revenue, wherein the king also is plaintiff, as the withholding and non-payment thereof is an injury to his *jura fiscalia* (fiscal rights). But, as by a fiction almost all sorts of civil actions are now allowed to be brought in the king's bench, in like manner by another fiction all kinds of personal suits may be prosecuted in the court of exchequer.

6. The exchequer chamber.—The next court that I shall mention is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions. This is the court of exchequer chamber; which was first erected by statute 31 Edw. III, c. 12, to determine causes by writs of error from the common law side of the court of exchequer. And to that end it consists of the lord chancellor and lord treasurer, taking unto them the justices of the king's bench and common pleas. In imitation of which a second court of exchequer chamber

was erected by statute 27 Eliz. ch. 8, consisting of the justices of the common pleas, and the barons of the exchequer, before whom writs of error may be brought to reverse judgments in certain suits originally begun in the court of king's bench. Into the court also of exchequer chamber (which then consists of all the judges of the three superior courts, and now and then the lord chancellor also), are sometimes adjourned from the other courts such causes as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below.

From all the branches of this court of exchequer chamber, a writ of error lies to

7. **House of lords is the supreme court.**—The house of peers, which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error, to rectify any injustice or mistake of the law, committed by the courts below. To this authority this august tribunal succeeded of course upon the dissolution of the *aula regia*. For, as the barons of parliament were constituent members of that court; and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed, that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived. They are therefore in all causes the last resort, from whose judgment no farther appeal is permitted; but every subordinate tribunal must conform to their determinations; the law reposing an entire confidence in the honor and conscience of the noble persons who compose this important assembly, that (if possible) they will make themselves masters of those questions upon which they undertake to decide, and in all dubious cases refer themselves to the opinions of the judges, who are summoned by writ to advise them; since upon their decision all property must finally depend.

8. **Assize courts.**—The ordinary civil courts are derived out of, and act as collateral auxiliaries to, the foregoing; I mean the courts of assize and nisi prius. These are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom except London

and Middlesex, where courts of nisi prius are holden in and after every term, before the chief or other judge of the several superior courts; and except the four northern counties, where the assizes are holden only once a year, to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of Westminster Hall. These judges of assize came into use in the room of the ancient justices in eyre.

Authority of judges of assize. The judges upon their circuit now sit by virtue of five several authorities. (1) The commission of the peace. (2) A commission of oyer and terminer. (3) A commission of general gaol-delivery. The fourth commission is, (4) a commission of assize, directed to the justices and serjeants therein named, to take (together with their associates) assizes in the several counties; that is, to take the verdict of a peculiar species of jury, called an assize, and summoned for the trial of landed disputes, of which hereafter. The other authority is (5) that of nisi prius, which is a consequence of the commission of assize, being annexed to the office of those justices by the statute of Westm. 2, 13 Edw. I, c. 30, and it empowers them to try all questions of fact issuing out of the courts at Westminster, that are then ripe for trial by jury. These by the course of the courts are usually appointed to be tried at Westminster in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arises; but with this proviso, "nisi prius," unless before the day prefixed the judges of assize come into the county in question. This they are sure to do in the vacations preceding each Easter and Michaelmas term, which saves much expense and trouble.

9. Chancery.—The high court of chancery is the only remaining, and in matters of civil property by much the most important of any, of the king's superior and original courts of justice.

Office of chancellor. It has its name of chancery, *cancellaria,* from the judge who presides here, the lord chancellor or *cancellarius;* who, Sir Edward Coke tells us, is so termed *a cancellando,* from cancelling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction. He had the supervision of all charters, letters, and such other public instruments of the crown, as were authenticated in the most

solemn manner; and, therefore, when seals came in use, he had always the custody of the king's great seal.

How created. So that the office of chancellor, or lord keeper (whose authority by statute 5 Eliz. c. 18, is declared to be exactly the same), is with us at this day created by the mere delivery of the king's great seal into his custody: whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom; and superior in point of precedency to every temporal lord. He is a privy counsellor by his office, and, according to Lord Chancellor Ellesmere, prolocutor of the house of lords by prescription.

Ministerial power. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic (for none else were then capable of an office so conversant in writings), and presiding over the royal chapel, he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of twenty marks per annum in the king's books. He is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom.

Judicial authority of the chancellor. And all this, over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the court of chancery; wherein, as in the exchequer, there are two distinct tribunals: the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

10. Admiralty courts.—Besides the several courts which were treated of in this chapter and in which all injuries are redressed, that fall under the cognizance of the common law of England, or that spirit of equity which ought to be its constant attendant, there were some other courts of a special jurisdiction; which took cognizance of certain species of injuries, of an ecclesiastical, military and maritime nature; and were distinguished by the title of ecclesiastical courts, courts military, and courts maritime.

The maritime courts, or such as have power and jurisdiction to determine all maritime injuries, arising upon the seas, or in parts out of reach of the common law, are only the court of admiralty, and its courts of appeal.

Prize. Appeals from the vice-admiralty courts in America, and our other plantations and settlements, may be brought before the courts of admiralty in England, as being a branch of the admiral's jurisdiction, though they may also be brought before the king in council. But in case of prize vessels, taken in time of war, in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prize, the appeal lies to certain commissioners of appeals consisting chiefly of the privy council, and not to judges delegates. And this by virtue of divers treaties with foreign nations; by which particular courts are established in all the maritime countries of Europe for the decision of this question, whether lawful prize or not: for this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country to determine it. The original court to which this question is permitted in England is the court of admiralty; and the court of appeal is in effect the king's privy council, the members of which are, in consequence of treaties, commissioned under the great seal for this purpose.

11. Ecclesiastical courts.—Matrimonial causes, or cases respecting the rights of marriage, were a branch of the ecclesiastical jurisdiction. Though if we consider marriages in the light of mere civil contracts, they do not seem to be properly of spiritual cognizance. But the Romanists having very early converted this contract into a holy sacramental ordinance, the church of course took it under her protection, upon the division of the two jurisdictions. And, in the hands of such able politicians, it soon became an engine of great importance to the papal scheme of an universal monarchy over Christendom. The numberless canonical impediments that were invented, and occasionally dispensed with, by the holy see, not only enriched the coffers of the church, but gave it a vast ascendant over princes of all denominations; whose marriages were sanctified or reprobated, their issue legitimated or bastardized, and the succession to their thrones established or rendered precarious, according to the humor or interest of the reigning pontiff.

Divorces also, of which, and their several distinctions, we treated at large in a former book, were causes thoroughly matrimonial and cognizable by the ecclesiastical judge. If it becomes improper, through some supervenient cause arising *ex post facto*

(after the fact), that the parties should live together any longer; as through intolerable cruelty, adultery, a perpetual disease, and the like; this unfitness or inability for the marriage state may be looked upon as an injury to the suffering party: and for this the ecclesiastical law administers the remedy of separation, or a divorce *a mensa et thoro* (from bed and board). But if the cause existed previous to the marriage, and was such a one as rendered the marriage unlawful *ab initio,* as consanguinity, corporal imbecility, or the like; in this case the law looks upon the marriage to have been always null and void, being contracted *in fraudem legis,* and decrees not only a separation from bed and board, but *a vinculo matrimonii* itself. The last species of matrimonial causes is a consequence drawn from one of the species of divorce, that *a mensa et thoro;* which is the suit for alimony, a term which signifies maintenance: which suit the wife, in case of separation, may have against her husband, if he neglects or refuses to make her an allowance suitable to their station in life. This is an injury to the wife, and the court christian will redress it by assigning her a competent maintenance, and compelling the husband by ecclesiastical censures to pay it. But no alimony will be assigned in case of a divorce for adultery on her part; for as that amounts to a forfeiture of her dower after his death, it is also a sufficient reason why she should not be a partaker of his estate when living.

Testamentary causes were another species belonging to the ecclesiastical jurisdiction; which, as they are certainly of a mere temporal nature may seem at first view a little oddly ranked among matters of a spiritual cognizance. And, indeed (as was in some degree observed in a former book), they were originally cognizable in the king's courts of common law, viz., the county courts; and afterwards transferred to the jurisdiction of the church, by the favor of the crown, as a natural consequence of granting to the bishops the administration of intestates' effects.

This jurisdiction is divisible into three branches; the probate of wills, the granting of administration, and the suing for legacies. The two former of which, when no opposition is made, are granted merely ex officio et debito justitiæ, and are then the object of what is called the voluntary, and not the contentious jurisdiction. But when a caveat is entered against proving the will or granting administration, and a suit thereupon follows to

determine either the validity of the testament, or who hath a right to administer; this claim and obstruction by the adverse party are an injury to the party entitled, and as such are remedied by the sentence of the spiritual court, either by establishing the will or granting the administration.

Subtraction, the withholding or detaining of legacies, is also still more apparently injurious, by depriving the legatees of that right with which the laws of the land and the will of the deceased have invested them; and, therefore, as a consequential part of testamentary jurisdiction, the spiritual court administers redress herein, by compelling the executor to pay them. But in this last case the courts of equity exercise a concurrent jurisdiction with the ecclesiastical courts, as incident to some other species of relief prayed by the complainant; as to compel the executor to account for the testator's effects, or assent to the legacy, or the like. For, as it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives there also its full determination.

CHAPTER XXXVI.

THE PLEADINGS IN ACTIONS AT LAW.

1. Order of treatment.—I am now, in the next place, to examine the manner in which the several remedies are pursued and applied, by action in the courts of common law; to which I shall afterwards subjoin a brief account of the proceedings in the courts of equity. The most natural and perspicuous way of considering the subject before us will be (I apprehend) to pursue it in the order and method wherein the proceedings themselves follow each other: rather than to distract and subdivide it by any more logical analysis. The general, therefore, and orderly parts of a suit are these: (1) The original writ: (2) The process: (3) The pleadings: (4) The issue or demurrer: (5) The trial: (6) The judgment and its incidents: (7) The execution: (8) The proceedings in nature of appeals.

2. The original writ.—First, then, of the original, or original writ; which is the beginning or foundation of the suit.

Determines form of action. When a person hath received an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider with himself, or take advice, what redress the law has given for that injury; and thereupon, is to make application or suit to the crown, the fountain of all justice, for that particular specific remedy which he is determined or advised to pursue. As, for money due on bond, an action of debt; for goods detained without force, an action of detinue or trover; or, if taken with force, an action of trespass vi et armis; or to try the title of lands, a writ of entry or action of trespass in ejectment; or for any consequential injury received, a special action on the case. To this end he is to sue out, or purchase by paying the stated fees, an original, or original writ, from the court of chancery, which is the *officina justitiæ*, the shop or mint of justice, wherein all the king's writs are framed.

Nature of the writ. It is a mandatory letter from the king in parchment, sealed with his great seal, and directed to the sheriff

of the county wherein the injury is committed or supposed so to be, requiring him to command the wrongdoer, or party accused, either to do justice to the complainant, or else to appear in court, and answer the accusation against him.

Basis of jurisdiction or authority of the law courts. Whatever the sheriff does in pursuance of this writ, he must return or certify to the court of common pleas, together with the writ itself: which is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause. For it was a maxim introduced by the Normans, that there should be no proceeding in common pleas before the king's justices without his original writ; because they held it unfit that those justices, being only the substitutes of the crown, should take cognizance of any thing but what was thus expressly referred to their judgment.

The return day. The day on which the defendant is ordered to appear in court, and on which the sheriff is to bring in the writ and report how far he has obeyed it, is called the return of the writ: it being then returned by him to the king's justices at Westminster. And it is always made returnable at the distance of at least fifteen days from the date or *teste*, that the defendant may have time to come up to Westminster, even from the most remote parts of the kingdom; and upon some day in one of the four terms in which the court sits for the dispatch of business.

3. **Appearance of defendant compelled.**—The next step for carrying on the suit, after suing out the original, is called the process; being the means of compelling the defendant to appear in court. This is sometimes called original process, being founded upon the original writ; and also to distinguish it from mesne or intermediate process, which issues, pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses, and the like. Mesne process is also sometimes put in contradistinction to final process, or process of execution; and then it signifies all such process as intervenes between the beginning and end of a suit.

[The common law was strangely reluctant to render judgment by default against a defendant who failed to appear in person or by attorney and submit himself to the jurisdiction of the court when duly summoned.]

Thus much for process, which is only meant to bring the

defendant into court, in order to contest the suit, and abide the determination of the law. When he appears either in person as a prisoner, or out upon bail, then follow the pleadings between the parties, which we shall consider at large in this chapter.

4. The declaration.—Pleadings are the mutual altercations between the plaintiff and defendant; which at present are set down and delivered into the proper office in writing, though formerly they were usually put in by their counsel *ore tenus* (by word of mouth), or *viva voce* (by word of mouth), in court, and then minuted down by the chief clerks, or prothonotaries. The first of these is the declaration, narratio, or count, in which the plaintiff sets forth his cause of complaint at length, being indeed only an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of time and place, when and where the injury was committed.

5. Dismissal of action.—If the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law in any subsequent stage of the action, he is adjudged not to follow or pursue his remedy as he ought to do, and thereupon a nonsuit or non prosequitur is entered; and he is said to be nonpros'd.

When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his defence, and to put in a plea; else the plaintiff will at once recover judgment by default, or *nihil dicit* of the defendant.

6. Dilatory pleas.—Pleas are of two sorts: dilatory pleas, and pleas to the action. Dilatory pleas are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy, rather than by denying the injury; pleas to the action are such as dispute the very cause of suit.

Dilatory pleas are, (1) To the jurisdiction of the court: alleging, that it ought not to hold plea of this injury, it arising in Wales or beyond sea. (2) The disability of the plaintiff, by reason whereof he is incapable to commence or continue the suit; as, that he is an alien enemy, outlawed, not in rerum natura (in the nature of things, or, in the world) (being only a fictitious person), an infant, a feme-covert, or a monk professed. (3) In abatement, which abatement is either of the writ or the count, for some defect in one of them; as by misnaming the defendant, which is called a misnomer; giving him a wrong addition, as

esquire instead of knight; or other want of form in any material respect. Or, it may be, that the plaintiff is dead; for the death of either party is at once an abatement of the suit.

And in actions merely personal, arising ex delicto (from wrong done), for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona* (a personal action dies with the person); and it never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury. But in actions arising ex contractu (from contract), by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against or by the executors: being indeed rather actions against the property than the person.

When these dilatory pleas are allowed, the cause is either dismissed from that jurisdiction; or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ, by leave ordained from the court: or to amend and new frame his declaration. But when on the other hand they are overruled as frivolous, the defendant has judgment of respondeat ouster, or to answer over in some better manner. It is then incumbent on him to plead a plea to the action; that is, to answer to the merits of the complaint. This is done by confessing or denying it.

7. Pleas by way of confession and set-off.—A confession of the whole complaint is not very usual, for then the defendant would probably end the matter sooner; or not plead at all, but suffer judgment to go by default.

Tender. Yet sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt, and plead the tender; adding, that he has always been ready, *tout temps prist,* and is still ready, *uncore prist,* to discharge it: for a tender by the debtor and refusal by the creditor, will in all cases discharge the costs but not the debt itself; though in some particular cases the creditor will totally lose his money.

Paying money into court. A species of this sort of confession is the payment of money into court; which is for the most part necessary upon pleading a tender, and is itself a kind of tender to the plaintiff; by paying into the hands of the proper officer of the court as much as the defendant acknowledges to be due, together with the costs hitherto incurred, in order to prevent the expense of any farther proceedings. This may be done upon what is called a motion; which is an occasional application to the court by the parties or their counsel, in order to obtain some rule or order of court, which becomes necessary in the progress of a cause; and it is usually grounded upon an affidavit (the perfect tense of the verb affido), being a voluntary oath before some judge or officer of the court, to evince the truth of certain facts, upon which the motion is grounded: though no such affidavit is necessary for payment of money into court. If after the money paid in the plaintiff proceeds in his suit, it is at his own peril: for, if he does not prove more due than is paid into court, he shall be nonsuited and pay the defendant costs; but he shall still have the money so paid in, for that the defendant has acknowledged to be his due.

Set-off. To this head may also be referred the practice of what is called a set-off: whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand; but on the other sets up a demand of his own, to counterbalance that of the plaintiff, either in the whole or in part: as if the plaintiff sues for ten pounds due on a note of hand, the defendant may set off nine pounds due to himself for merchandise sold to the plaintiff, and in case he pleads such set-off, must pay the remaining balance into court. This answers very nearly to the *compensatio* or stoppage of the civil law, and depends on the statutes 2 Geo. II, c. 22, and 8 Geo. II, c. 24, which enact, that where there are mutual debts between the plaintiff and defendant, one debt may be set against the other, and either pleaded in bar or given in evidence upon the general issue at the trial; which shall operate as payment and extinguish so much of the plaintiff's demand.

8. **Pleas in bar.**—Pleas that totally deny the cause of complaint, are either the general issue, or a special plea, in bar. The general issue, or general plea, is what traverses, thwarts, and denies at once the whole declaration; without offering any spe-

cial matter whereby to evade it. As in trespass, either in *vi et armis* or on the case, *non culpabilis*, not guilty; in debt upon contract, *nihil debet*, he owes nothing; in debt on bond, *non est factum*, it is not his deed; on an assumpsit, *non assumpsit*, he made no such promise.

These pleas are called the general issue, because by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an issue: by which we mean a fact affirmed on one side and denied on the other.

Formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a special plea; which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. And it is an invariable rule, that every defence which cannot be thus specially pleaded, may be given in evidence upon the general issue at the trial. But the science of special pleading having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves every thing open, the fact, the law, and the equity of the case; and have allowed special matter to be given in evidence at the trial. And though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness anciently observed, yet experience has shown it to be otherwise; especially with the aid of a new trial, in case either party be unfairly surprised by the other.

Special pleas, in bar, of the plaintiff's demand, are very various, according to the circumstances of the defendant's case. As, in real actions, a general release or a fine, both of which may destroy and bar the plaintiff's title. Or in personal actions, an accord, arbitration, conditions performed, nonage of the defendant, or some other fact which precludes the plaintiff from his action.

A justification is likewise a special plea in bar; as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault; in trespass, that the defendant did the thing complained of in right of some office which warranted

him so to do; or, in an action of slander, that the plaintiff is really as bad a man as the defendant said he was.

Also, a man may plead the statutes of limitation in bar; or the time limited by certain acts of parliament, beyond which no plaintiff can lay his cause of action.

9. Technical requirements as to pleas.—The conditions and qualities of a plea are, (1) That it be single and containing only one matter; for duplicity begets confusion. But by statute 4 and 5 Ann. c. 16, a man, with leave of the court, may plead two or more distinct matters or single pleas; as, in an action of assault and battery, these three, not guilty, *son assault de mesne* (his own assault), and the statute of limitations. (2) That it be direct and positive, and not argumentative. (3) That it have convenient certainty of time, place, and persons. (4) That it answer the plaintiff's allegations in every material point. (5) That it be so pleaded as to be capable of trial.

Special pleas are usually in the affirmative, sometimes in the negative; but they always advance some new fact not mentioned in the declaration; and then must be averred to be true in the common form—"and this he is ready to verify." This is not necessary in pleas of the general issue; those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

It is a rule in pleading, that no man be allowed to plead specially such a plea as amounts only to the general issue, or a total denial of the charge; but in such case he shall be driven to plead the general issue in terms, whereby the whole question is referred to a jury.

10. Alternating pleadings—Replication.—When the plea of the defendant is thus put in, if it does not amount to an issue or total contradiction of the declaration, but only evades it, the plaintiff may plead again, and reply to the defendant's plea; either traversing it; that is, totally denying it; as, if in an action of debt upon bond the defendant pleads *solvit ad diem*, that he paid the money when due; here the plaintiff in his replication may totally traverse this plea, by denying that the defendant paid it; or, he may allege new matter in contradiction to the defendant's plea; as when the defendant pleads no award made, the plaintiff may reply and set forth an actual award, and assign a breach; or the replication may confess and

avoid the plea, by some new matter or distinction consistent with the plaintiff's former declaration; as, in an action for trespassing upon land whereof the plaintiff is seised, if the defendant shows a title to the land by descent, and that therefore he had a right to enter, and gives color to the plaintiff, the plaintiff may either traverse and totally deny the fact of the descent; or he may confess and avoid it, by replying, that true it is that such descent happened, but that since the descent the defendant himself demised the lands to the plaintiff for term of life.

To the replication the defendant may rejoin, or put in an answer called a rejoinder. The plaintiff may answer the rejoinder by a sur-rejoinder. Upon which the defendant may rebut. And the plaintiff answer him by a sur-rebutter. Which pleas, replications, rejoinders, sur-rejoinders, rebutters, and sur-rebutters, answer to the *exceptio, replicatio, duplicatio, triplicatio,* and *quadruplicatio* (exception, replication, duplication, triplication, and quadruplication) of the Roman laws.

11. Consistency in pleading.—The whole of this process is denominated the pleading; in the several stages of which it must be carefully observed, not to depart or vary from the title or defence, which the party has once insisted on. For this (which is called a departure in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the plea.

Yet in many actions the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh with all its specific circumstances in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a new or novel assignment. As if the plaintiff in trespass declares on a breach of his close in D; and the defendant pleads that the place where the injury is said to have happened, is a certain close of pasture in D, which descended to him from B his father, and so is his own freehold; the plaintiff may reply and assign another close in D, specifying the abuttals and boundaries, as the real place of the injury.

12. Duplicity.—It hath previously been observed that duplicity in pleading must be avoided. Every plea must be simple, entire, connected, and confined to one single point: it

must never be entangled with a variety of distinct, independent answers to the same matter; which must require as many different replies and introduce a multitude of issues upon one and the same dispute. For this would often embarrass the jury, and sometimes the court itself, and at all events would greatly enhance the expense of the parties.

13. **Issues of law and fact.**—In any stage of the pleadings, when either side advances or affirms any new matter, he usually (as was said) avers it to be true; "and this he is ready to verify." On the other hand, when either side traverses or denies the facts pleaded by his antagonist, he usually tenders an issue, as it is called; the language of which is different according to the party by whom the issue is tendered; for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "and of this he puts himself upon the country," thereby submitting himself to the judgment of his peers: but if the traverse lies upon the plaintiff, he tenders the issue, or prays the judgment of the peers against the defendant in another form; thus: "and this he prays may be inquired of by the country." For when in the course of pleading they come to a point which is affirmed on one side, and denied on the other, they are then said to be at issue; all their debates being at last contracted into a single point, which must now be determined either in favor of the plaintiff or of the defendant.

Issue, exitus, being the end of all the pleadings, is the fourth part or stage of an action, and is either upon matter of law, or matter of fact.

An issue upon matter of law is called a demurrer; and it confesses the facts to be true, as stated by the opposite party; but denies that, by the law arising upon these facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs, *demoratur*, rests or abides upon the point in question. As, if the matter of the plaintiff's complaint or declaration be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration; if, on the other hand, the defendant's excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without making out the stranger's right; here the plaintiff may demur in law to the plea; and so on in every other part of the proceed-

ings, where either side perceives any material objection in point of law, upon which he may rest his case.

The form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient in law to maintain the action or the defence; and therefore praying judgment for want of sufficient matter alleged. Sometimes demurrers are merely for want of a sufficient form in the writ or declaration. But in case of exceptions to the form or manner of pleading, the party demurring must, by statutes 27 Eliz. c. 5, and 4 and 5 Ann. c. 16, set forth the causes of his demurrer, or wherein he apprehends the deficiency to consist. And upon either a general, or such a special demurrer, the opposite party must aver it to be sufficient, which is called a joinder in demurrer, and then the parties are at issue in point of law. Which issue in law, or demurrer, the judges of the court before which the action is brought must determine.

An issue of fact is where the fact only, and not the law, is disputed. And when he that denies or traverses the fact pleaded by his antagonist has tendered the issue, thus: "and this he prays may be inquired of by the country;" or, "and of this he puts himself upon the country;" it may immediately be subjoined by the other party, "and the said A B doth the like." Which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question. And this issue of fact must, generally speaking, be determined, not by the judges of the court, but by some other method; the principal of which methods is that by the country, *per pais* (in Latin *per patriam*), that is, by jury.

CHAPTER XXXVII

TRIAL PRACTICE AND EVIDENCE.

1. **Summoning the jury.**—The subject of our next inquiries will be the nature and method of the trial by jury; called also the trial per pais, or by the country; a trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof. When, therefore, an issue is joined, by these words, "and this the said A prays may be inquired of by the country," or, "and of this he puts himself upon the country,—and the said B does the like," the court awards a writ of venire facias (that you may cause to come) upon the roll or record, commanding the sheriff "that he cause to come here on such a day, twelve free and lawful men, *liberos et legales homines,* of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A, nor the aforesaid B, to recognize the truth of the issue between the said parties." And such writ was accordingly issued to the sheriff.

If the sheriff be not an indifferent person; as if he be a party in the suit, or be related either by blood or affinity to either of the parties, he is not then trusted to return the jury, but the venire shall be directed to the coroners, who in this, as in many other instances, are the substitutes of the sheriff, to execute process when he is deemed an improper person.

If any exception lies to the coroners, the venire shall be directed to two clerks of the court, or two persons of the county named by the court, and sworn. And these two, who are called *elisors,* or electors, shall indifferently name the jury, and their return is final; no challenge being allowed to their array.

2. **Venue or place of trial.**—The locality of trial required by the common law seems a consequence of the ancient rule as to drawing jurors from the county and hundred where the cause of action arose. For living in the neighborhood, they were properly the very country, or pais, to which both parties had

appealed; and were supposed to know beforehand the characters of the parties and witnesses, and therefore they better knew what credit to give to the facts alleged in evidence. But this convenience was overbalanced by another very natural and almost unavoidable inconvenience; that jurors, coming out of the immediate neighborhood, would be apt to intermix their prejudices and partialities in the trial of right. All over the world, actions transitory follow the person of the defendant, territorial suits must be discussed in the territorial tribunal. I may sue a Frenchman here for a debt contracted abroad; but lands lying in France must be sued for there, and English lands must be sued for in the kingdom of England, and in the county where they are situated.

The administration of justice should not only be chaste, but should not even be suspected. A jury coming from the neighborhood has in some respects a great advantage; but is often liable to strong objections; especially in small jurisdictions, as in cities which are counties of themselves, and such where assizes are but seldom holden; or where the question in dispute has an extensive local tendency; where a cry has been raised, and the passions of the multitude been inflamed; or where one of the parties is popular, and the other a stranger or obnoxious. It is true that, if a whole county is interested in the question to be tried, the trial by the rule of law must be in some adjoining county; but, as there may be a strict interest so minute as not to occasion any bias, so there may be the strongest bias without any pecuniary interest. In all these cases, to summon a jury, laboring under local prejudices, is laying a snare for their consciences: and, though they should have virtue and vigor of mind sufficient to keep them upright, the parties will grow suspicious, and resort under various pretences to another mode of trial.

The courts of law will therefore in transitory actions very often change the venue, or county wherein the cause is to be tried: but in local actions, though they sometimes do it indirectly and by mutual consent, yet, to effect it directly and absolutely, the parties are driven to a court of equity; where, upon making out a proper case, it is done upon the ground of being necessary to a fair, impartial, and satisfactory trial.

3. **Common and special juries.**—But we will now suppose all previous steps to be regularly settled, and the cause to be

called on in court. The record is then handed to the judge, to peruse and observe the pleadings, and what issues the parties are to maintain and prove, while the jury is called and sworn. The jurors contained in the panel are either special or common jurors.

Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. In such cases the officer is to take indifferently forty-eight of the principal freeholders in the presence of the attorneys on both sides; who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel.

A common jury is one returned by the sheriff according to the directions of the statute 3 Geo. II, c. 25, which appoints that the sheriff or officer shall not return a separate panel for every separate cause, as formerly; but one and the same panel for every cause to be tried at the same assizes, containing not less than forty-eight, nor more than seventy-two jurors: and that their names, being written on tickets, shall be put into a box or glass; and when each cause is called, twelve of those persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent; challenged, or excused.

4. Challenging the jury.—As the jurors appear when called, they shall be sworn, unless challenged by either party. Challenges are of two sorts: challenges to the array, and challenges to the polls.

Challenges to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return; and they may be made upon account of partiality or some default in the sheriff, or his under-officer who arrayed the panel. And generally speaking, the same reasons, that, before the awarding the venire, were sufficient to have directed it to the coroners or elisors, will be also sufficient to quash the array, when made by a person or officer of whose partiality there is any tolerable ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is good cause of challenge to the array.

Challenges to the polls, in capita, are exceptions to the particular jurors; and seem to answer to the *recusatio judicis* (objection to the judge) in the civil and canon laws; by the constitutions of which a judge might be refused upon any suspicion of partiality. By the laws of England, also, in the times of Bracton and Fleta, a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challenged. For the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehavior would draw down a heavy censure from those to whom the judge is accountable for his conduct.

But challenges to the polls of the jury (who are judges of fact) are reduced to four heads by Sir Edward Coke, *propter honoris respectum; propter defectum; propter affectum;* and *propter delictum* (on account of dignity, on account of incompetency, on account of partiality, on account of the commission of some offence).

(1) *Propter honoris respectum;* as if a lord of parliament be impanelled on a jury, he may be challenged by either party, or he may challenge himself.

(2) *Propter defectum;* as if a juryman be an alien born, this is defect of birth; if he be a slave or bondman, this is defect of liberty, and he cannot be *liber et legalis homo.* Under the word *homo,* also, though a name common to both sexes, the female is however excluded, *propter defectum sexus* (because not of the male sex): except when a widow feigns herself with child, in order to exclude the next heir, and a supposititious birth is suspected to be intended; then upon the writ *de ventre inspiciendo* (of inspecting pregnancy), a jury of women is to be impanelled to try the question, whether with child or not. But the principal deficiency is defect of estate sufficient to qualify him to be a juror.

(3) *Challenge for prejudice.* Jurors may be challenged *propter affectum,* for suspicion of bias or partiality. This may be either a principal challenge, or to the favor. A principal challenge is such, where the cause assigned carries with it prima

facie evident marks of suspicion, either of malice or favor: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled, for jurors must be *omni exceptione majores* (above all exception). Challenges to the favor are where the party hath no principal challenge: but objects only some probable circumstances of suspicion, as acquaintance and the like; the validity of which must be left to the determination of *triors,* whose office is to decide whether the juror be favorable or unfavorable.

(4) Challenges *propter delictum* are for some crime or misdemeanor that affects the juror's credit and renders him infamous. As for a conviction of treason, felony, perjury, or conspiracy; or if for some infamous offence he hath received judgment of the pillory, tumbrel, or the like; or to be branded, whipped, or stigmatized; or if he be outlawed or excommunicated, or hath been attained of false verdict, *præmunire,* or forgery; or, lastly, if he hath proved recreant when champion in the trial by battle, and thereby hath lost his *liberam legem.*

Examination of jurors. A juror may himself be examined on oath of *voir dire, veritatem dicere* (to speak the truth), with regard to such causes of challenge as are not to his dishonor or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage.

Besides these challenges, which are exceptions against the fitness of jurors, and whereby they may be excluded from serving, there are also other causes, to be made use of by the jurors themselves, which are matter of exemption; whereby their service is excused and not excluded.

Privilege from serving. This exemption is also extended by divers statutes, customs, and charters, to physicians and other medical persons, counsel, attorneys, officers of the courts, and the like; all of whom, if impanelled, must show their special exemption. Clergymen are also usually excused, out of favor

and respect to their function: but, if they are seized of lands and tenements, they are, in strictness, liable to be impanelled.

Summoning talesmen. If, by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a tales. A tales is a supply of such men as are summoned upon the first panel, in order to make up the deficiency. When a sufficient number of persons impanelled, or tales-men, appear, they are then separately sworn, well and truly to try the issue between the parties, and a true verdict to give according to the evidence; and hence they are denominated the jury, *jurata,* and jurors, *sc. juratores.*

5. Order of trial.—The jury are now ready to hear the merits; and, to fix their attention the closer to the facts which they are impanelled and sworn to try, the pleadings are opened to them by counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question.

The opening counsel briefly informs them what has been transacted in the court above; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings, and, lastly, upon what point the issue is joined, which is there set down to be determined. Instead of which, formerly the whole record and process of the pleadings was read to them in English by the court, and the matter in issue clearly explained to their capacities. The nature of the case, and the evidence intended to be produced, are next laid before them by counsel also on the same side: and when their evidence is gone through, the advocate on the other side opens the adverse case, and supports it by evidence; and then the party which began is heard by way of reply.

6. Rules of evidence.—The nature of my present design will not permit me to enter into the numberless niceties and distinctions of what is, or is not, legal evidence to a jury. I shall only, therefore, select a few of the general heads and leading maxims, relative to this point, together with some observations on the manner of giving evidence.

Relevancy. And, first, evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other; and no

evidence ought to be admitted to any other point. Therefore upon an action of debt, when the defendant denies his bond by the plea of *non est factum*, and the issue is, whether it be the defendant's deed or no; he cannot give a release of this bond in evidence: for that does not destroy the bond, and therefore does not prove the issue which he has chosen to rely upon, viz., that the bond has no existence.

Again; evidence is of two kinds, either oral or documentary. Written proofs, or evidence, are, (1) Records; and (2) Ancient deeds of thirty years standing, which prove themselves; but (3) Modern deeds; and (4) Other writings, must be attested and verified by parol evidence of witnesses.

Best evidence rule. And one general rule that applies to documents is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years, nothing else shall be admitted but the very deed of lease itself, if in being; but if that be positively proved to be burnt or destroyed (not relying on any loose negative, as that it cannot be found, or the like), then an attested copy may be produced; or parol evidence be given of its contents.

Hearsay. So, no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute), the courts admit of hearsay evidence, or an account of what persons deceased have declared in their lifetime: but such evidence will not be received of any particular facts.

Books of account. So, too, books of account, or shop-books, are not allowed of themselves to be given in evidence for the owner; but a servant who made the entry may have recourse to them to refresh his memory; and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence: for as tradesmen are often under a necessity of giving credit without any note or writing, this is therefore, when accompanied with such other

collateral proofs of fairness and regularity, the best evidence that can then be produced. However, this dangerous species of evidence is not carried so far in England as abroad; where a man's own books of accounts, by a distortion of the civil law (which seems to have meant the same thing as is practiced with us), with the suppletory oath of the merchant, amount at all times to full proof. But as this kind of evidence, even thus regulated, would be much too hard upon the buyer at any long distance of time, the statute 7 Jac. I, c. 12 (the penners of which seem to have imagined that the books of themselves were evidence at common law), confines this species of proof to such transactions as have happened within one year before the action brought; unless between merchant and merchant in the usual intercourse of trade.

7. **Witnesses' attendance.**—With regard to witnesses; it must be first remembered that there is a process to bring them in by writ of *subpœna ad testificandum* (a subpœna to give evidence); which commands them, laying aside all pretences and excuses, to appear at the trial on pain of 100*l.* to be forfeited to the king; to which the statute 5 Eliz. c. 9, has added a penalty of 10*l.* to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expenses be tendered him, is bound to appear at all; nor, if he appears, is he bound to give evidence till such charges are actually paid him; except he resides within the bills of mortality, and is summoned to give evidence within the same.

Competency of witnesses. All witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are infamous, or such as are interested in the event of the cause. All others are competent witnesses; though the jury from other circumstances will judge of their credibility. Infamous persons are such as may be challenged as jurors, *propter delictum;* and therefore never shall be admitted to give evidence to inform that jury, with whom they were too scandalous to associate.

Examination of witnesses upon voir dire. Interested witnesses may be examined upon a voir dire, if suspected of being secretly concerned in the event; or their interest may be proved in court. Which last is the only method of supporting an

objection to the former class: for no man is to be examined to prove his own infamy.

Privileged witnesses. And no counsel, attorney, or other person entrusted with the secrets of the cause by the party himself shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy, as came to his knowledge by virtue of such trust and confidence: but he may be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowledge without being intrusted in the cause.

Number of witnesses. One witness (if credible) is sufficient evidence to a jury of any single fact, though undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy; and therefore does not always demand the testimony of two which the civil law universally requires. *"Unius responsio testis omnino non audiatur."* (The evidence of one witness may never be admitted.) To extricate itself out of which absurdity, the modern practice of the civil law courts has plunged itself into another. For, as they do not allow a less number than two witnesses to be *plena probatio* (full proof), they call the testimony of one, though never so clear and positive, *semi-plena probatio* (half proof) only on which no sentence can be founded. To make up, therefore, the necessary complement of witnesses, when they have one only to a single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf; and administer to him what is called the suppletory oath; and if his evidence happens to be in his own favor, this immediately converts the half proof into a whole one. By this ingenious device, satisfying at once the forms of the Roman law, and acknowledging the superior reasonableness of the law of England: which permits one witness to be sufficient where no more are to be had: and, to avoid all temptations of perjury, lays it down as an invariable rule, that *nemo testes esse debet in propria causa* (no one should be a witness in his own cause).

Oath of witnesses. The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the whole truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point

or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated and by the judge are openly and publicly allowed or disallowed, in the face of the country: which must curb any secret bias or partiality that might arise in his own breast.

8. **Advantages of oral examination.**—This open examination of witnesses, viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law; where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.

Nor is the presence of the judge, during the examination, a matter of small importance: for, besides the respect and awe with which his presence will naturally inspire the witness, he is able, by use and experience, to keep the evidence from wandering from the point in issue. In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness, in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them; and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it. These are a few of the

advantages attending this, the English, way of giving testimony, *ore tenus*.

9. **Charging the jury.**—When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.

10. **Deliberation of jury.**—The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict: and in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are unanimously agreed. If they speak with either of the parties or their agents, after they are gone from the bar; or if they receive any fresh evidence in private; or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. This necessity of a total unanimity seems to be peculiar to our own constitution; or at least in the *nembda* or jury of the ancient Goths, there was required (even in criminal cases) only the consent of the major part; and in case of an equality, the defendant was held to be acquitted.

11. **Rendition of verdict.**—When they are all unanimously agreed, the jury return back to the bar; and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement to which, by the old law, he is liable, as has been formerly mentioned, in case he fails in his suit, as a punishment for his false claim.

A verdict *vere dictum* is either privy or public. A privy verdict is when the judge hath left or adjourned the court: and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge

out of court: which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in court; wherein the jury may, if they please, vary from the privy verdict. So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged. But the only effectual and legal verdict is the public verdict: in which they openly declare to have found the issue for the plaintiff, or for the defendant; and if for the plaintiff, they assess the damages also sustained by the plaintiff, in consequence of the injury upon which the action is brought.

Special verdict. Sometimes, if there arises in the case any difficult matter of law, the jury, if for the sake of better information, and to avoid the danger of having their verdict attainted, will find a special verdict; which is grounded on the statute of Westm. 2, 13 Edw. I, c. 30, § 2. And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court should be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried.

General verdict on special case. Another method of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge of the court above, on a special case, stated by the counsel on both sides with regard to a matter of law: which has this advantage over a special verdict, that it is attended with much less expense, and obtains a much speedier decision: the *postea* (of which in the next chapter) being stayed in the hands of the officer nisi prius, till the question is determined, and the verdict is then entered for the plaintiff or defendant, as the case may happen. But, as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court upon the point of law. Which makes it a thing to be wished, that a method could be devised of either lessening the expense of special verdicts, or else of entering the cause at length upon the *postea*. But in both these instances the jury

may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law; and, without either verdict or special case, may find a verdict absolutely either for the plaintiff or defendant.

Discharge of jury. When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury; a trial which, besides the other vast advantages which we have occasionally observed in its progress, is also as expeditious and cheap, as it is convenient, equitable, and certain; for a commission out of chancery, or the civil law courts, for examining witnesses in one cause will frequently last as long, and of course be full as expensive, as the trial of a hundred issues at nisi prius: and yet the fact cannot be determined by such commissioners at all; no, not till the depositions are published, and read at the hearing of the cause in court.

CHAPTER XXXVIII

JUDGMENT, EXECUTION, AND JUDICIAL REVIEW.

1. **Entry of final judgment.**—In the present chapter we are to consider the transactions in the cause subsequent to trial of the issue.

Next follows the judgment of the court upon what has previously passed; both the matter of law and matter of fact being now fully weighed and adjusted. Judgment may however for certain causes be suspended, or finally arrested: for it cannot be entered till the next term after trial had, and that upon notice to the other party. So that if any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, the party may have relief in the court above, by obtaining a new trial; or if, notwithstanding the issue of fact be regularly decided, it appears that the complaint was either not actionable in itself, or not made with sufficient precision and accuracy, the party may supersede it by arresting or staying the judgment.

2. **New trial.**—Causes of suspending the judgment, by granting a new trial are at present wholly extrinsic, arising from matter foreign to, or *dehors* the record. Of this sort are want of notice of trial; or any flagrant misbehavior of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehavior of the jury among themselves: also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages; or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict: for these, and other reasons of the like kind, it is the practice of the court to award a new, or second trial. But if two juries agree in the same or a similar verdict, a third trial is seldom awarded: for the law will not readily suppose, that the verdict of any one subsequent jury can countervail the oaths of the

two preceding ones. And the former strictness of the courts of law in respect of new trials, having driven many parties into courts of equity to be relieved from oppressive verdicts, they are now more liberal in granting them: the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another.

Next to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive: he would arraign the determination as manifestly unjust; and abhor a tribunal which he imagined had done him an injury without a possibility of redress.

Advantages of new trial. Granting a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other: and the subsequent verdict, though contrary to the first, imports no title of blame upon the former jury; who, had they possessed the same lights and advantages, would probably have altered their opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case.

3. Nature of judgment.—If judgment is not by some of these means arrested within the first four days of the next term after the trial, it is then to be entered on the roll or record. Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record; and are of four sorts. First, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon demurrer; secondly, where the law is admitted by the parties, and the facts disputed, as in the case of judgment

on a verdict; thirdly, where both the fact and the law arising thereon are admitted by the defendant; which is the case of judgments by confession or default; or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution, which is the case in judgments upon a nonsuit or retraxit.

A prescription or award of relief. The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: against him who hath rode over my corn, I may recover damages by law: but A hath rode over my corn; therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law: if the minor, it is then an issue of fact; but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow. Which judgment or conclusion depends not, therefore, on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the award of relief prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of procuring it. What that relief may be is, indeed, the result of deliberation and study to point out, and therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but "it is considered," *consideratum est per curiam* (it is considered by the court), that the plaintiff do recover his damages, his debt, his possession, and the like: which implies that the judgment is none of their own; but the act of law, pronounced and declared by the court, after due deliberation and inquiry.

Interlocutory and final. All these species of judgments are either interlocutory or final. Interlocutory judgments are such as are given in the middle of a clause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit.

On dilatory pleas. Of this nature are all judgments for the plaintiff upon pleas in abatement of the suit or action: in which it is considered by the court that the defendant do answer

over, *respondeat ouster;* that is, put in a more substantial plea. It is easy to observe, that the judgment here given is not final, but merely interlocutory; for there are afterwards farther proceedings to be had, when the defendant hath put in a better answer.

Determining the merits, but leaving open the damages. But the interlocutory judgments most usually spoken of are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the quantum of damages sustained by him is not ascertained: which is a matter that cannot be done without the intervention of a jury.

4. **Costs.**—Thus much for judgments; to which costs are a necessary appendage; it being now as well the maxim of ours as of the civil law, that "*victus victori in expensis condemnandus est*" (he who loses the suit pays costs to his adversary): though the common law did not professedly allow any, the amercement of the vanquished party being his only punishment.

5. **Execution of judgment.**—If the regular judgment of the court, after the decision of the suit, be not suspended, superseded, or reversed, the next and last step is the execution of that judgment; or putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

Possession of real and personal property. If the plaintiff recovers in an action real or mixed, whereby the seisin or possession of land is awarded to him, the writ of execution shall be an *habere facias seisinam* (that you give him seisin), or writ of seisin, of a freehold; or an *habere facias possessionem* (that you give him possession), or writ of possession, of a chattel interest. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered: in the execution of which the sheriff may take with him the *posse comitatus,* or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of seisin, is sufficient execution of the writ. In replevin and detinue (the only actions for recovering the specific possession of personal chattels), if the wrongdoer be very per-

verse, he cannot be compelled to a restitution of the identical thing taken or detained; but he still has his election to deliver the goods or their value: and imperfection in the law, that results from the nature of personal property, which is easily concealed or conveyed out of the reach of justice, and not always amenable to the magistrate.

In money actions. Executions in actions where money only is recovered, as a debt or damages (and not any specific chattel), are of five sorts: either against the body of the defendant; or against his goods and chattels; or against his goods and the profits of his lands; or against his goods and the possession of his lands; or against all three, his body, lands, and goods.

A capias. The first of these species of execution is by writ of *capias ad satisfaciendum,* which addition distinguishes it from the former *capias ad respondendum,* which lies to compel an appearance at the beginning of the suit. And properly speaking, this cannot be sued out against any but such as were liable to be taken upon the former capias. The intent of it is, to imprison the body of the debtor till satisfaction be made for the debt, costs, and damages: it therefore doth not lie against any privileged persons, peers, or members of parliament, nor against executors or administrators, nor against such other persons as could not be originally held to bail.

The writ of capias ad satisfaciendum is an execution of the highest nature, inasmuch as it deprives a man of his liberty, till he makes the satisfaction awarded; and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. Only by statute 21 Jac. I, c. 24, if the defendant dies, while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods, or chattels. The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster on a day therein named, to make the plaintiff satisfaction for his demand. And, if he does not then make satisfaction, he must remain in custody till he does.

A fieri facias. The next species of execution is against the goods and chattels of the defendant, and is called a writ of *fieri facias* (that you cause to be made), from the words in it where the sheriff is commanded, *quod fieri faciat de bonis,* that

he cause to be made of the goods and chattels of the defendant the sum or debt recovered. This lies as well against privileged persons, peers, &c., as other common persons; and against executors or administrators with regard to the goods of the deceased. The sheriff may not break open any outer door, to execute either this, or the former writ: but must enter peaceably; and may then break open any inner door, belonging to the defendant, in order to take the goods. And he may sell the goods and chattels (even an estate for years, which is a chattel real) of the defendant, till he has raised enough to satisfy the judgment and costs; first paying the landlord of the premises, upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole. If part only of the debt be levied, on a fieri facias, the plaintiff may have a *capias ad satisfaciendum* for the residue.

A levari facias. A third species of execution is by writ of *levari facias;* which affects a man's goods and the profits of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant: whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff. Little use is now made of this writ; the remedy by *elegit,* which takes possession of the lands themselves, being much more effectual.

Writ of elegit. The fourth species of execution is by the writ of *elegit* (he hath chosen), which is a judicial writ given by the statute Westm. 2, 13 Edw. I, c. 18, either upon a judgment for a debt, or damages; or upon the forfeiture of a recognizance taken in the king's court. By the common law a man could only have satisfaction of goods, chattels, and the present profits of lands, by the two last-mentioned writs of fieri facias or levari facias; but not the possession of the lands themselves; which was a natural consequence of the feudal principles, which prohibited the alienation, and of course the incumbering of the fief with the debts of the owner. And when the restriction of alienation began to wear away, the consequence still continued; and no creditor could take the possession of lands, but only levy the growing profits: so that if the defendant aliened his lands the plaintiff was ousted of his remedy. The statute therefore granted this writ (called an elegit, because it is in the choice or election of the plaintiff whether he will sue out this

writ or one of the former), by which the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen and beasts of the plough) are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety or one-half of his freehold lands, which he had at the time of the judgment given, whether held in his own name, or by any other in trust for him, are also to be delivered to the plaintiff; to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired; as till the death of the defendant, if he be tenant for life or in tail. During this period the plaintiff is called tenant by elegit.

Limitation on time of issuing execution. These are the methods which the law of England has pointed out for the execution of judgments: and when the plaintiff's demand is satisfied, either by the voluntary payment of the defendant, or by this compulsory process, or otherwise, satisfaction ought to be entered on the record, that the defendant may not be liable to be thereafter harassed a second time on the same account. But all these writs of execution must be sued out within a year and a day after the judgment is entered, otherwise the court concludes, prima facie, that the judgment is satisfied and extinct; yet, however, it will grant a writ of scire facias in pursuance of statute Westm. 2, 13 Edw. I, c. 45, for the defendant to show cause why the judgment should not be revived, and execution had against him; to which the defendant may plead such matter as he has to allege, in order to show why process of execution should not be issued; or the plaintiff may still bring an action of debt, founded on his dormant judgment, which was the only method of revival allowed by the common law.

6. Review of record by writ of error.—The principal method of redress for erroneous judgments in the king's courts of record, is by writ of error to some superior court of appeal. A writ of error lies for some supposed mistake in the proceedings of a court of record. The writ of error only lies upon matter of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it: there being no method of reversing an error in the determination of facts, but by a new trial, to correct the mistakes of the former verdict.

A bill of exceptions. If, either in his direction or decisions,

the judge misstates the law by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal a bill of exceptions, stating the point wherein he is supposed to err: and this he is obliged to seal by statute Westm. 2, 13 Edw. I, c. 31, or, if he refuses so to do, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: and if he returns, that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of a record on appeal; examinable, not in the court out of which the record issues for the trial at nisi prius, but in the next immediate superior court, upon a writ of error, after judgment given in the court below.

Bail on writ of error. If a writ of error be brought to reverse any judgment of an inferior court of record, where the damages are less than ten pounds; or if it is brought to reverse the judgment of any superior court after verdict, he that brings the writ, or that is plaintiff in error, must (except in some peculiar cases) find substantial pledges of prosecution or bail; to prevent delays by frivolous pretences to appeal; and for securing payment of costs and damages, which are now payable by the vanquished party in all, except a few particular instances, by virtue of several statutes.

From what courts error lies. A writ of error lies from the inferior courts of record in England into the king's bench, and not into the common pleas. Also from the king's bench in Ireland to the king's bench in England. It likewise may be brought from the common pleas at Westminster to the king's bench; and then from the king's bench the cause is removable to the house of lords. From proceedings on the law side of the exchequer a writ of error lies into the court of exchequer chamber before the lord chancellor, lord treasurer, and the judges of the court of king's bench and common pleas; and from thence it lies to the house of peers. From proceedings in the king's bench, in debt, detinue, covenant, account, case, ejectment, or trespass, originally begun therein by bill (except where the king is party), lies to the exchequer chamber, before the justices of the common pleas and barons of the exchequer; and from thence also to the house of lords; but where the proceedings in the king's bench do not first commence therein

by bill, but by original writ sued out of chancery, this takes the case out of the general rule laid down by the statute; so that the writ of error then lies, without any intermediate stage of appeal, directly to the house of lords, the dernier resort for the ultimate decision of every civil action. Each court of appeal, in their respective stages, may, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior courts, but none of them are final, save only the house of peers, to whose judicial decisions all other tribunals must therefore submit and conform their own. And thus much for the reversal or affirmance of judgments at law, by writs in the nature of appeals.

CHAPTER XXXIX.

NATURE OF EQUITY AND ITS RELATION TO THE OLDER COMMON LAW.

1. Origin of equity.—Before we enter on the proposed subject of the ensuing chapter, viz., the nature and method of proceedings in the courts of equity, it will be proper to recollect the observations which were made in the beginning of this book on the principal tribunals of that kind, acknowledged by the constitution of England; and to premise a few remarks upon those particular causes, wherein any of them claims and exercises an equitable jurisdiction, distinct from that at law, and to consider the nature of equity and its relation to "law" in the narrower sense of that term.

For, though equity is mentioned by Bracton as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton (composed under the auspices and in the name of Edward I, and treating particularly of courts and their several jurisdictions), is there a syllable to be found relating to the equitable jurisdiction of the court of chancery.

[The dual system of law and equity can be understood only by reference to its historical development. Such a system was not inherently necessary, but is to be accounted for by the retarded development of the law courts, their limited authority and the intolerable defects of their doctrines and remedies. The king made a partial delegation of his power of administering justice to the king's courts, consisting of the King's Bench, the Common Bench (or Common Pleas), and the Exchequer. Their constitutional jurisdiction became fixed, when in the latter half of the 13th century the power of issuing new original writs to meet new sorts of cases or new theories of liability became restricted to cases which were analogous to those covered by precedents of former writs. Here probably arose the strict common law doctrine of "stare decisis" or following precedents.]

[The residuary power and duty of doing complete justice still remained in the king, assisted by his privy council, and this discretionary authority of supplying the defects of the older courts was gradually delegated to the chancellor; thus the equitable jurisdiction of the Court of Chancery became established, independent of the system of original writs and of the strict limitations of precedent.[1]]

2. Common law remedies and jurisdiction confined by system of original writs.—The idea of a court of equity as distinguished from a court of law did not exist in the original plan of partition of jurisdiction. But when the older courts of law proceeding only on precedents of the king's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person, assisted by his privy council (from whence, also, arose the jurisdiction of the court of requests, which was virtually abolished by the statute 16 Car. I, c. 10); and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom, not only among our Saxon ancestors, before the institution of the aula regia, but also after its dissolution, in the reign of King Edward I; and, perhaps, during its continuance, in that of Henry II.

New writs in analogy to old. In these early times, the chief judicial employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the chancery, who were too much attached to ancient precedents, it is provided by statute, Westm. 2, 13 Edw. I, c. 24, that "whensoever from thenceforth in one case a writ shall be found in the chancery, and in a like case, falling under the same right and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one; and, if they cannot

[1] On the position of equity in the legal system, see article by Professor W. N. Hohfeld, "The Relations Between Equity and Law," Michigan Law Review, Vol. X, No. 8, June, 1913, where the subject is most clearly and learnedly outlined.

agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors."

Trespass on the case. And this accounts for the very great variety of writs of trespass on the case to be met with in the register; whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reason and equity of his very case. Which provision (with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending, rather than narrowing, the remedial effects of the writ), might have effectually answered all the purposes of a court of equity; except that of obtaining a discovery by the oath of the defendant, [and specific relief.]

3. **Separate jurisdiction of chancery established.**—But when, about the end of the reign of King Edward III, uses of lands were introduced, and though totally discountenanced by the courts of common law, were considered as fiduciary deposits and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established; and John Waltham, who was bishop of Salisbury and chancellor to King Richard II, by a strained interpretation of the above mentioned statute of Westm. 2, devised the writ of subpœna, returnable in the court of chancery only, to make the feoffee to uses accountable to his cestuy que use; which process was afterwards extended to other matters.

Procedure in chancery. No regular judicial system at that time prevailed in the court; but the suitor when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman: no lawyer having sat in the court of chancery from the times of the chief justices Thorpe and Knyvet, successively chancellors to King Edward III, in 1372 and 1373, to the promotion of Sir Thomas Moore by King Henry VIII, in 1530. After which the great seal was indiscriminately committed to the custody of lawyers, or courtiers, or churchmen, according to the convenience of the times and the disposition of the prince required, till Sergeant Puckering was made lord keeper in 1592; from which time to the present the court of chancery has always

been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was intrusted to Dr. Williams, then dean of Westminster, but afterwards bishop of Lincoln; who had been chaplain to Lord Ellesmere, when chancellor.

Dispute over power of equity. In the time of Lord Ellesmere (A. D. 1616) arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the court of king's bench; whether a court of equity could give relief after or against a judgment at the common law? This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *præmunire*, by questioning in a court of equity a judgment in the court of king's bench, obtained by gross fraud and imposition. This matter being brought before the king, was by him referred to his learned counsel for their advice and opinion: who reported so strongly in favor of the courts of equity, that his majesty gave judgment in their behalf; but not contented with the irrefragible reasons and precedents produced by his counsel (for the chief justice was clearly in the wrong), he chose rather to decide the question by referring it to the plentitude of his royal prerogative. Sir Edward Coke submitted to the decision, and thereby made atonement for his error: but this struggle, together with the business of *commendams* (in which he acted a very noble part), and his controlling the commissioners of sewers, were the open and avowed causes, first, of his suspension and soon after, of his removal from his office.

Beginning of orderly practice. Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system; but did not sit long enough to effect any considerable revolution in the science itself: and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles I, did little to improve upon his plan; and even after the restoration the seal was committed to the earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years; and afterwards to the earl of Shaftesbury, who (though a lawyer by education) had never practiced at all.

Sir Heneage Finch, who succeeded in 1673, and became afterwards earl of Nottingham, was a person of the greatest abilities

and most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his country; and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and jurisdiction upon wide and rational foundations; which have also been extended and improved by many great men, who have since presided in chancery. And from that time to this the power and business of the court have increased to an amazing degree.

4. The nature of equity in general.—Let us next take a brief, but comprehensive view of the general nature of equity, as now understood and practiced in our several courts of judicature. I have formerly touched upon it, but imperfectly: it deserves a more complete explication. Yet as nothing is hitherto extant that can give a stranger a tolerable idea of the courts of equity subsisting in England, as distinguished from the courts of law, the compiler of these observations cannot but attempt it with diffidence: those who know them best are too much employed to find time to write; and those who have attempted but little in those courts must be often at a loss for materials.

Equity, then, in its broadest non-technical meaning, is the soul and spirit of all law: positive law is construed, and rational law is made by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretation of the rule. But the very terms of a court of equity, and a court of law, as contrasted to each other, are apt to confound and mislead us: as if the one judged without equity, and the other was not bound by any law. [Equity in its technical sense must, however, not be confused with equity in the sense of natural justice. "Equity" is the term employed to denote that part of the law which has been formulated in the court of chancery. Equity is both supplementary to and corrective of the common law.]

Equity as corrective. Thus in the first place it is said, that it is the business of a court of equity in England to abate the rigor of the common law. But no such power is [exercised in all cases.] Hard was the case of bond-creditors whose debtor devised away his real estate; rigorous and unjust the rule, which put the devisee in a better condition than the heir; yet a court of equity had no power to interpose. Hard is the common law still subsisting, that land devised, or descending to the heir, shall not be liable to simple contract debts of the ancestor or devisor, although the money was laid out in purchasing the very land, and that the father shall never immediately succeed as heir to the real estate of the son: but a court of equity can give no relief; though in both these instances the artificial reason of the law, arising from feudal principles, has long ago entirely ceased. The like may be observed of the descent of lands to a remote relation of the whole blood, or even their escheat to the lord, in preference to the owner's half brother; and of the total stop to all justice, by causing the parol to demur, whenever an infant is sued as heir, or is party to a real action. In all such cases of positive law, the courts of equity, as well as the courts of law, must say with Ulpian, *"hoc quidem perquam durum est, sed ita lex scripta est"* (this indeed is very hard, but so is the law written).

5. Equitable interpretation.—It is said that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound and equally profess, to interpret statutes according to the true intent of the legislature. In general law all cases cannot be foreseen; or, if foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words, of the legislator; and others which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the equity of an act of parliament; and so cases within the letter are frequently out of the equity. Here by equity we mean nothing but the sound interpretation of the law; though the words of the law itself may be too general, too special, or otherwise inaccurate or defective. These, then, are the cases which, as Grotius says, *"lex non exacte definit, sed arbitrio boni viri*

permittit'' (the law does not define exactly, but leaves something to the discretion of a just and wise judge); in order to find out the true sense and meaning of the lawgiver, from every other topic of construction. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law and equity: the construction must in both be the same: or, if they differ, it is only as one court of law may also happen to differ from another. Each endeavors to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense in a single tittle.

6. Fraud, accident, and trust as grounds of jurisdiction.—Again, it hath been said, that fraud, accident and trust, are the proper and peculiar objects of a court of equity. But every kind of fraud is equally cognizable, and equally adverted to, in a court of law: and some frauds are cognizable only there: as fraud in obtaining a devise of lands, which is always sent out of the equity courts, to be there determined. Many accidents are also supplied in a court of law; as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies: and many cannot be relieved even in a court of equity; as, if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. A technical trust, indeed, created by the limitation of a second use, was forced into the courts of equity in the manner formerly mentioned; and this species of trusts, extended by inference and construction, have ever since remained as a kind of *peculium* in those courts. But there are other trusts, which are cognizable in a court of law: as deposits, and all manner of bailments; and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use, which is the ground of an action on the case almost as universally remedial as a bill in equity.

7. Precedents in equity.—Once more; it has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge, founded on the circumstances of every particular case. Whereas the system of our courts of equity is now become a labored, connected system, governed by

established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus the refusing of a wife her dower in a trust-estate, yet allowing the husband his curtesy: the holding the penalty of a bond to be merely a security for the debt and interest, yet considering it sometimes as the debt itself, so that the interest shall not exceed that penalty, the distinguishing between a mortgage at five per cent. with a clause of a reduction to four, if the interest be regularly paid, and a mortgage at four per cent. with a clause of enlargement to five, if the payment of the interest be deferred; so that the former shall be deemed a conscientious, the latter an unrighteous bargain: all these and other cases that might be instanced, are plainly rules of positive law; supported only by the reverence that is shown, and generally very properly shown, to a series of former determinations; that the rule of property may be uniform and steady. Nay, sometimes a precedent is so strictly followed, that a particular judgment, founded upon special circumstances, gives rise to a general rule.

8. **Equity as a system of law.**—In short, if a court of equity in England did really act as many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case. No wonder they are so often mistaken. Grotius, or Puffendorf, or any other of the great masters of jurisprudence, would have been as little able to discover, by their own light, the system of a court of equity in England, as the system of a court of law: especially, as the notions before mentioned of the character, power, and practice of a court of equity were formerly adopted and propagated (though not with approbation of the thing) by our principal antiquaries and lawyers; Spelman, Coke, Lambard, and Selden, and even the great Bacon himself. But this was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves, partly from the ignorance of law (being frequently bishops or statesmen), partly from ambition or lust of power (encouraged by the arbitrary principles of the age they lived in), but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority, as hath totally been disclaimed by their successors

for now about a century past. The decrees of a court of equity were then rather in the nature of awards, formed on the sudden *pro re nata* (for the occasion), with more probity of intention than knowledge of the subject; founded on no settled principles, as being never designed, and therefore never used for precedents. But the systems of jurisprudence, in our courts both of law and equity, are now equally artificial systems, founded on the same principles of justice and positive law; but varied by different usages in the forms and mode of their proceedings: the one being originally derived (though much reformed and improved) from the feudal customs, as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies, introduced by their clerical chancellors.

9. **General similarity of rules at law and in equity.**—The suggestion indeed of every bill, to give jurisdiction to the courts of equity (copied from those early times), is that the complainant hath no remedy at the common law. But he who should from thence conclude, that no case is judged of in equity where there might have been relief at law, and at the same time casts his eye on the extent and variety of the cases in our equity reports, must think the law a dead letter indeed. The rules of property, rules of evidence, and rules of interpretation in both courts are, or should be, exactly the same: both ought to adopt the best, or must cease to be courts of justice. Formerly some causes, which now no longer exist, might occasion a different rule to be followed in one court, from what was afterwards adopted in the other, as founded in the nature and reason of the thing: but, the instant those causes ceased, the measure of substantial justice ought to have been the same in both. Thus the penalty of a bond, originally contrived to evade the absurdity of those monkish constitutions which prohibited taking interest for money, was therefore very pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest: for the judges could not, as the law then stood, give judgment that the interest should be specifically paid. But when afterwards the taking of interest became legal, as the necessary companion of commerce, nay, after the statute of 37 Hen. VIII, c. 9, had declared the debt or loan itself to be "the just and true intent"

for which the obligation was given, their narrow-minded successors still adhered wilfully and technically to the letter of the ancient precedents, and refused to consider the payment of principal, interest, and costs, as a full satisfaction of the bond.

At the same time more liberal men, who sat in the courts of equity, construed the instrument according to its "just and true intent," as merely a security for the loan: in which light it was certainly understood by the parties, at least after these determinations; and therefore this construction should have been universally received. So in mortgages, being only a landed as the other is a personal security for the money lent, the payment of principal, interest, and costs, ought at any time, before judgment executed, to have saved the forfeiture in a court of law, as well as in a court of equity. And the inconvenience, as well as injustice, of putting different constructions in different courts upon one and the same transaction, obliged the parliament at length to interfere, and to direct, by the statutes 4 and 5 Ann. c. 16, and 7 Geo. II, c. 20, that, in the cases of bonds and mortgages, what had long been the practice of the courts of equity should also for the future be universally followed in the courts of law; wherein it had before these statutes in some degree obtained a footing.

Rules of construction. Again; neither a court of equity nor of law can vary men's wills or agreements, or (in other words) make wills or agreements for them. Both are to understand them truly, and therefore uniformly. One court ought not to extend, nor the other abridge, a lawful provision deliberately settled by the parties, contrary to its just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages; as a rent of 5*l.* an acre for ploughing up ancient meadow: nor against a lapse of time, where the time is material to the contract; as in covenants for the renewal of leases. Both courts will equitably construe, but neither pretends to control or change, a lawful stipulation or engagement.

The rules of decision are in both courts equally apposite to the subjects of which they take cognizance. Where the subject-matter is such as requires to be determined *secundum æquum et bonum* (according to right and justice), as generally upon

actions on the case, the judgments of the courts of law are guided by the most liberal equity. In matters of positive right, both courts must submit to and follow those ancient and invariable maxims "*quæ relicta sunt et tradita* (which are left and handed down to us). Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question is the object of that law: as in the case of the privileges of ambassadors, hostages, or ransom-bills. In mercantile transactions they follow the marine law, and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper forum: in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject; and if a question came before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country, and would both decide accordingly.

10. The difference between courts of law and equity.— Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist?

[It principally consists in this, that the chancellor, not being limited by the common law system of forms of action, could recognize and enforce personal obligations not covered by the theories of any of the original writs, and secondly in addition to supplementing and correcting the defects of substantive rights, the chancellor also supplemented the inadequacy of the common law procedure, execution and relief, as by decrees for specific performance or injunction, laying personal commands on the defendant to do justice, enforced by process of punishment for contempt.]

Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, viz.: the true construction of securities for money lent, and the form and effect of a trust or second use; upon these main pillars hath been gradually erected that structure of jurisprudence, which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the legal system which hath hitherto been

delineated in these Commentaries; however different they may appear in their outward form, from the different taste of their architects.

11. Grounds of equitable jurisdiction—Discovery by parties.—(1) When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction; and, that being once discovered, the judgment is the same in equity as it would have been at law. But for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account. As incident to accounts, they take a concurrent cognizance of the administration of personal assets, consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto; of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, receivers, factors, and agents. It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts.

From this same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud: all matters in the private knowledge of the party, which, though concealed, are binding in conscience; and all judgments at law, obtained through such fraud or concealment. And this, not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment, obtained by suppressing the truth; and which, had the same facts appeared on the trial as now are discovered, he would never have attained at all.

(2) *As to the mode of trial.* This is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside. If therefore the cause arises in a foreign country, and the witnesses reside upon the spot; if, in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if witnesses residing at home are aged or infirm; any of these cases lays a ground for a court of equity to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction, which might

have been exercised at law, if the witnesses could probably attend.

(3) *With respect to the mode of relief.* The want of a more specific remedy than can be obtained in the courts of law gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements. A court of equity will compel them to be carried into strict execution, unless where it is improper or impossible: instead of giving damages for their non-performance. And hence a fiction is established, that what ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally: and this fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. So of waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction. Over questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a jurisdiction, to prevent the expense and vexation of endless litigations and suits. In various kinds of frauds it assumes a concurrent jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief: as by setting aside fraudulent deeds, decreeing re-conveyances, or directing an absolute conveyance merely to stand as a security. And thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands, a court of equity holds plea of suits for the foreclosure of mortgages, liens and charges thereon.

(4) *The true construction of securities* for money lent is another fountain of jurisdiction in courts of equity. When they held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum bona fide advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it; but this ownership is mutually transferred, and the mortgagor is barred from redemption, if, when called upon by the mortgagee, he does not redeem within a time limited by

the court; or he may when out of possession be barred by length of time, by analogy to the statute of limitations.

(5) *The form of a trust* or second use, gives the courts of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction: but the trust is governed by very nearly the same rules, as would govern the estate in a court of law, if no trustee was interposed: and by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of the common law.

12. Equity as a science—Relation to law.—These are the principal (for I omit the minuter) grounds of the jurisdiction at present exercised in our courts of equity: which differ, we see, very considerably from the notions entertained by strangers, and even by those courts themselves before they arrived to maturity; as appears from the principles laid down, and the jealousies entertained of their abuse, by our early judicial writers cited in a former page; and which have been implicitly received and handed down by subsequent compilers, without attending to those gradual accessions and derelictions, by which in the course of a century this mighty river hath imperceptibly shifted its channel.

And certainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case the inconvenience that would arise from this uncertainty would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law and not by will.

But since the time when Lambard wrote, a set of great and eminent lawyers, who have successively held the great seal, have by degrees erected the system of relief administered by a court of equity into a regular science, which cannot be attained without study and experience, any more than the science of law: but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode of suit, as

readily and with as much precision in a court of equity as in a court of law.

Anomaly of having two systems of law. It were much to be wished, for the sake of certainty, peace, and justice, that each court would as far as possible follow the other, in the best and most effectual rules for attaining those desirable ends. It is a maxim that equity follows the law; and in former days the law has not scrupled to follow even that equity which was laid down by the clerical chancellors. Every one who is conversant in our ancient books, knows that many valuable improvements in the state of our tenures (especially in leaseholds and copyholds, and the forms of administering justice, have arisen from this single reason, that the same thing was constantly effected by means of a subpœna in the chancery. And sure there cannot be a greater solecism, than that in two sovereign independent courts established in the same country, exercising concurrent jurisdiction, and over the same subject-matter, there should exist in a single instance two different rules of property, clashing with or contradicting each other.

False impressions corrected. It would carry me beyond the bounds of my present purpose to go farther into this matter. I have been tempted to go so far, because strangers are apt to be confounded by nominal distinctions, and the loose unguarded expressions to be met with in the best of our writers; and thence to form erroneous ideas of the separate jurisdictions now existing in England, but which never were separated in any other country in the universe. It hath also afforded me an opportunity to vindicate, on the other hand, the justice of our courts of law from being that harsh and illiberal rule, which many are too ready to suppose it; and on the other the justice of our courts of equity from being the result of mere arbitrary opinion, or an exercise of dictatorial power, which rides over the law of the land, and corrects, amends, and controls it by the loose and fluctuating dictates of the conscience of a single judge. It is now high time to proceed to the practice of our courts of equity, thus explained, and thus understood.

CHAPTER XL.

EQUITY PLEADING AND PROCEDURE.

1. The bill of complaint.—The first commencement of a suit in chancery is by preferring a bill to the lord chancellor, in the style of a petition; "humbly complaining, sheweth to your lordship your orator A B that," &c. This is the nature of a declaration at common law, or a libel and allegation in the spiritual courts: setting forth the circumstances of the case at length, as, some fraud, trust, or hardship; "in tender consideration whereof" (which is the usual language of the bill), "and for that your orator is wholly without remedy at the common law,"

The prayer. Relief is therefore prayed at the chancellor's hands, and

Prayer for subpœna. Also process of subpœna against the defendant, to compel him to answer upon oath to all the matter charged in the bill. And,

Prayer for injunction. If it be to quiet the possession of lands to stay waste, or to stop proceedings at law, an injunction is also prayed, in the nature of an *interdictum* by the civil law, commanding the defendant to cease.

Parties to bills. This bill must call all necessary parties, however remotely concerned in interest, before the court, otherwise no decree can be made to bind them; and must be signed by counsel as a certificate of its decency and propriety.

Scandal or impertinence. For it must not contain matter either scandalous or impertinent: if it does, the defendant may refuse to answer it, till such scandal or impertinence is expunged, which is done upon an order to refer it to one of the officers of the court, called a master in chancery; of whom there are in number twelve, including the master of the rolls, all of whom, so late as the reign of Queen Elizabeth, were commonly doctors of the civil law. The master is to examine the propriety of the bill: and if he reports it scandalous or impertinent, such

matter must be struck out, and the defendant shall have his costs; which ought of right to be paid by the counsel who signed the bill.

2. **Temporary injunction.**—When the bill is filed in the office of the six clerks, if an injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to stay execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an injunction will issue of course: and, when the answer comes in the injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by affidavits, the court will grant an injunction immediately to continue till the defendant has put in his answer, and till the court shall make some farther order concerning it: and when the answer comes in, whether it shall then be dissolved or continued till the hearing of the cause, is determined by the court upon argument, drawn from considering the answer and affidavit together.

3. **Process to compel appearance—Subpœna.**—But, upon common bills, as soon as they are filed, process of subpœna is taken out: which is a writ commanding the defendant to appear and answer to the bill, on pain of 100*l*. But this is not all: for if the defendant, on service of the subpœna, does not appear within the time limited by the rules of the court, and plead, demur, or answer to the bill, he is then said to be in contempt; and the respective processes of contempt are in successive order awarded against him.

4. **Defendant's pleadings.**—But if the defendant appears regularly, and takes a copy of the bill, he is next to demur, plead, or answer. A demurrer in equity is nearly of the same nature as a demurrer in law: being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill; as, for want of sufficient matter of equity therein contained; or where the plaintiff, upon his own showing, appears to have no right; or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehavior. For any of these causes a defend-

ant may demur to the bill. And if, on demurrer, the defendant prevails, the plaintiff's bill shall be dismissed: if the demurrer be over-ruled, the defendant is ordered to answer.

Pleas in equity. A plea may be either to the jurisdiction; showing that the court has no cognizance of the cause; or to the person, showing some disability in the plaintiff, as by outlawry, excommunication, and the like; or it is in bar; showing some matter wherefore the plaintiff can demand no relief, as an act of parliament, a fine, a release, or a former decree. And the truth of this plea the defendant is bound to prove, if put upon it by the plaintiff.

Several modes of defence. But as bills are often of a complicated nature, and contain various matter, a man may plead as to part, demur as to part, and answer as to the residue. But no exceptions to formal *minutiæ* in the pleadings will be here allowed; for the parties are at liberty, on the discovery of any errors in form, to amend them.

An answer is the most usual defence that is made to a plaintiff's bill. It is given in upon oath, but where there are amicable defendants, their answer is usually taken without oath by consent of the plaintiff. This method of proceeding is taken from the ecclesiastical courts, like the rest of the practice in chancery: for there in almost every case the plaintiff may demand the oath of his adversary in supply of proof. Formerly this was done in those courts with compurgators in the manner of our waging of law; but this has been long disused and instead of it the present kind of purgation, by the single oath of the party himself, was introduced.

An answer must be signed by counsel, and must either deny or confess all the material parts of the bill; or it may confess and avoid, that is, justify or palliate the facts. If one of these is not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer. A defendant cannot pray anything in this his answer, but to be dismissed the court: if he has any relief to pray against the plaintiff, he must do it by an original bill of his own, which is called a cross-bill.

5. Incidental practice—Amendments to a bill.—After answer put in, the plaintiff, upon payment of costs, may amend his bill, either by adding new parties or new matter, or both,

upon the new lights given him by the defendant; and the defendant is obliged to answer afresh to such amended bill.

Supplemental bill. But this must be before the plaintiff has replied to the defendant's answer, whereby the cause is at issue: for afterwards, if new matter arises which did not exist before, he must set it forth by a supplemental bill.

Bill of revivor. There may be also a bill of revivor when the suit is abated by the death of any of the parties; in order to set the proceedings again in motion, without which they remain at a stand.

Bill of interpleader. And there is likewise a bill of interpleader, where a person who owes a debt or rent to one of the parties in suit, but, till the determination of it, he knows not to which, desires that they may interplead, that he may be safe in the payment. In this last case it is usual to order the money to be paid into court for the benefit of such of the parties to whom, upon hearing, the court shall decree it to be due. But this depends upon circumstances; and the plaintiff must also annex an affidavit to his bill, swearing that he does not collude with either of the parties.

6. **Reply or hearing on bill and answer.**—If the plaintiff finds sufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause upon bill and answer only. But in that case he must take the defendant's answer to be true in every point. Otherwise the course is for the plaintiff to reply generally to the answer, averring his bill to be true, certain and sufficient, and the defendant's answer to be directly the reverse; which he is ready to prove as the court shall award; upon which the defendant rejoins, averring the like on his side; which is joining issue upon the facts in dispute. To prove which facts is the next concern.

7. **Depositions of witnesses.**—This is done by examination of witnesses, and taking their depositions in writing, according to the manner of the civil law. And for that purpose interrogatories are framed, or questions in writing; which, and which only, are to be proposed to, and asked of, the witnesses in the cause. These interrogatories must be short and pertinent; not leading ones (as, "did not you see this?" or, "did not you hear that?"); for if they be such the depositions taken thereon will be suppressed and not suffered to be read. For the purpose of

examining witnesses in or near London, there is an examiner's office appointed; but for such as live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them, to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there upon their own oaths, and (if foreigners) upon the oaths of skilful interpreters. And it hath been established that the deposition of an heathen who believes in the Supreme Being, taken by commission in the most solemn manner according to the custom of his own country, may be read in evidence.

The commissioners. These are sworn to take the examinations truly and without partiality, and not to divulge them till published in the court of chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of subpœna, as in the courts of common law, to appear and submit to examination. And when their depositions are taken, they are transmitted to the court with the same care that the answer of a defendant is sent.

Bill to perpetuate testimony. If witnesses to a disputable fact are old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses, although no suit is depending; for it may be a man's antagonist only waits for the death of some of them to begin his suit. This is most frequent when lands are devised by will away from the heir at law; and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will verbatim therein, suggesting that the heir is inclined to dispute its validity; and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will; after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill; but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery.

Opening depositions. When all the witnesses are examined, then, and not before, the depositions may be published, by a rule to pass publication; after which they are open for the inspection of all parties, and copies may be taken of them.

8. **Hearing the case.**—The cause is then ripe to be set down for hearing, which may be done at the procurement of the plain-

tiff or defendant, before either the lord chancellor or the master of the rolls, according to the discretion of the clerk in court, regulated by the nature and importance of the suit, and the arrear of causes depending before each of them respectively. Concerning the authority of the master of the rolls, to hear and determine causes, and his general power in the court of chancery, there were (not many years since) divers questions and disputes very warmly agitated, to quiet which it was declared by statute 3 Geo. II, c. 30, that all orders and decrees by him made, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid; subject nevertheless to be discharged or altered by the lord chancellor, and so as they shall not be enrolled, till the same are signed by his lordship. Either party may be subpœnaed to hear judgment on the day so fixed for the hearing: and then, if the plaintiff does not attend, his bill is dismissed with costs; or, if the defendant makes default, a decree will be made against him, which will be final, unless he pays the plaintiff's costs of attendance, and shows good cause to the contrary on a day appointed by the court. A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a nonsuit at law, if he suffers three terms to elapse without moving forward in the cause.

In case of cross-bill. When there are cross causes, on a cross-bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them.

The method of hearing causes in court is usually this: The parties on both sides appearing by their counsel, the plaintiff's bill is first opened, or briefly abridged, and the defendant's answer also, by the junior counsel on each side; after which the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom: and then such depositions as are called for by the plaintiff are read by one of the six clerks, and the plaintiff may also read such part of the defendant's answer as he thinks material or convenient: and after this, the rest of the counsel for the plaintiff make their observations and arguments. Then the defendant's counsel go through the same process for him, except that they may not

read any part of his answer; and the counsel for the plaintiff are heard in reply.

9. Decrees.—When all are heard, the court pronounces the decree, adjusting every point in debate, according to equity and good conscience; which decree being usually very long, the minutes of it are taken down and read openly in court by the registrar. The matter of costs to be given to either party, is not here held to be a point of right, but merely discretionary, according to the circumstances of the case, as they appear more or less favorable to the party vanquished.

Final or interlocutory decrees. The chancellor's decree is either interlocutory or final. It very seldom happens that the first decree can be final, or conclude the cause; for, if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions that it will not bind the parties thereby, but usually directs the matter to be tried by jury; especially such important facts as the validity of a will, or whether A is the heir at law to B.

10. Reference of certain questions to law courts.—As no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of king's bench, or at the assizes upon a feigned issue. For (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is brought, wherein the plaintiff, by a fiction, declares that he laid a wager of 5*l.* with the defendant that A was heir at law to B; and then avers that he is so; and therefore demands the 5*l.* The defendant admits the feigned wager, but avers that A is not the heir to B; and therefore that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity. These feigned issues seem borrowed from the *sponsio judicialis* of the Romans: and are also frequently used in the courts of law, by consent of the parties to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause.

Taking opinion on question of law. So, likewise, if a question of mere law arises in the course of a cause, as whether, by the words of a will, an estate for life or in tail is created, or whether a future interest devised by a testator shall operate

as a remainder or an executory devise, it is the practice of this court to refer it to the opinion of the judges of the court of king's bench or common pleas, upon a case stated for that purpose, wherein all the material facts are admitted, and the point of law submitted to their decision; who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such certificate the decree is usually founded.

11. **Accountings before master.**—Another thing also retards the completion of decrees. Frequently long accounts are to be settled, incumbrances and debts to be inquired into, and a hundred little facts to be cleared up, before a decree can do full and sufficient justice. These matters are always, by the decree on the first hearing, referred to a master in chancery to examine; which examinations frequently last for years; and then he is to report the fact, as it appears to him, to the court.

Master's report. This report may be excepted to, disproved, and overruled; or otherwise, is confirmed and made absolute, by order of the court. When all issues are tried and settled and all references to the master ended, the cause is again brought to hearing upon the matters of equity reserved; and a final decree is made: the performance of which is enforced (if necessary) by commitment of the person, or sequestration of the person's estate.

12. **Review in equity.**—And if, by this decree, either party thinks himself aggrieved, he may petition the chancellor for a rehearing; whether it was heard before his lordship, or any of the judges, sitting for him, or before the master of the rolls. For whoever may have heard the cause, it is the chancellor's decree, and must be signed by him before it is enrolled; which is done, of course, unless a rehearing be desired. Every petition for a rehearing must be signed by two counsel of character, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be reheard. And upon the rehearing, all the evidence taken in the cause, whether read before or not, is now admitted to be read; because it is the decree of the chancellor himself, who only now sits to hear reasons why it should not be enrolled and perfected; at which time all omissions of either evidence or argument may be supplied. But, after the decree is once signed and enrolled, it

cannot be reheard or rectified but by bill of review, or by appeal to the house of lords.

A bill of review may be had upon an apparent error in judgment, appearing on the face of the decree; or by special leave of the court upon oath made of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review.

An appeal to parliament, that is, to the house of lords, is the dernier resort of the subject who thinks himself aggrieved by an interlocutory order or final determination in this court: and it is effected by a petition to the house of peers, and not by writ of error, as upon judgment at common law.

CHAPTER XLI.

PUBLIC OR EXTRAORDINARY WRITS AND ADMINISTRATIVE PROCEEDINGS.

1. **Mandamus.**—We come now to certain special proceedings of a more or less public nature.

A writ of mandamus is, in general, a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.

It is a high prerogative writ of a most extensively remedial nature; and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office: but it issues in all cases where the party hath a right to have any thing done, and hath no other specific means of compelling its performance. A mandamus, therefore, lies to compel the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting-house, &c: it lies for the production, inspection, or delivery of public books and papers; for the surrender of the regalia of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible to recite minutely. But at present we are more particularly to remark, that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them: and this not only by restraining their excesses,

but also by quickening their negligence, and obviating their denial of justice. A mandamus may therefore be had to the courts of the city of London, to enter up judgment; to the spiritual courts to grant an administration, to swear a churchwarden, and the like.

This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below; whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made (except in some general cases, where the probable ground is manifest) directing the party complained of to show cause why a writ of mandamus should not issue: and, if he shows no sufficient cause, the writ itself is issued, at first in the alternative, either to do thus, or signify some reason to the contrary; to which a return, or answer, must be made at a certain day. And, if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a peremptory mandamus to do the thing absolutely; to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person makes no return, or fails in his respect and obedience, he is punishable for his contempt by attachment. But, if he, at the first, returns a sufficient cause, although it should be false in fact, the court of king's bench will not try the truth of the fact upon affidavits; but will for the present believe him, and proceed no farther on the mandamus. But then the party injured may have an action against him for his false return, and (if found to be false by the jury) shall recover damages equivalent to the injuries sustained; together with a peremptory mandamus to the defendant to do his duty. Thus much for the injury or neglect or refusal of justice.

2. **Prohibition.**—The other injury, which is that of encroachment of jurisdiction, or calling one *coram non judice* (before a judge unauthorized to take cognizance of the affair), to answer in a court that has no legal cognizance of the cause, is also a grievance, for which the common law has provided a remedy by the writ of prohibition. A prohibition is a writ issuing properly only out of the court of king's bench, being the king's prerogative writ; but, for the furtherance of justice, it may now also be had in some cases out of the court of chancery, common

pleas, or exchequer, directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion, that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.

3. Information to assert public rights.—An information on behalf of the crown, filed in the exchequer by the king's attorney-general, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the crown. It differs from an information filed in the court of king's bench, of which we shall treat in the next book; in that this is instituted to redress a private wrong, by which the property of the crown is affected; that is calculated to punish some public wrong or heinous misdemeanor in the defendant. It is grounded on no writ under seal, but merely on the intimation of the king's officer, the attorney-general, who "gives the court to understand and be informed of" the matter in question: upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are those of intrusion and debt: intrusion, for any trespass committed on the lands of the crown, as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, or the like; and debt, upon any contract for moneys due to the king, or for any forfeiture due to the crown upon the breach of a penal statute. This is most commonly used to recover forfeitures occasioned by transgressing those laws which are enacted for the establishment and support of the revenue; others, which regard mere matters of police and public convenience, being usually left to be enforced by common informers, in the qui tam informations or actions. But after the attorney-general has informed upon the breach of a penal law, no other information can be received. There is also an information in rem, when any goods are supposed to become the property of the crown, and no man appears to claim them, or to dispute the title of the king.

4. Quo warranto.—A writ of quo warranto (by what warrant) is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to

determine the right. It lies also in case of non-user or long neglect of a franchise, or misuser or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. And in case of judgment for the defendant, he shall have an allowance of his franchise; but in case of judgment for the king, for that the party is entitled to no such franchise, or hath disused or abused it, the franchise is either seized into the king's hands, to be granted out again to whomever he shall please; or, if it be not such a franchise as may subsist in the hands of the crown, there is merely judgment of ouster, to turn out the party who usurped it.

The judgment on a writ of quo warranto (being in the nature of a writ of right) is final and conclusive, even against the crown. Which, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by information filed in the court of king's bench by the attorney-general, in the nature of a writ of quo warranto; wherein the process is speedier, and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the crown; but hath long been applied to the mere purposes of trying the civil right, seizing the franchise or ousting the wrongful possessor; the fine being nominal only.

5. Bankruptcy and other administrative proceedings.—[We shall have to omit certain administrative proceedings, particularly bankruptcy. Probate proceedings, receiverships, guardianship matters and other cases where the winding up or handling of estates is supervised by a court might also be considered at this point.]

CHAPTER XLII.

CRIMINAL COURTS, CONSERVATORS OF THE PEACE, AND THE MEANS OF PREVENTING OFFENCES.

1. Courts of a criminal jurisdiction.—The last object of our inquries, as to procedure, will be the method of inflicting those punishments which the law has annexed to particular offences; and which I have constantly subjoined to the description of the crime itself. In the discussion of which, I shall pursue much the same general method that I followed in the preceding chapters, with regard to the redress of civil injuries; by, first, pointing out the several courts of criminal jurisdiction, wherein offenders may be prosecuted to punishment; and by, secondly, deducing down in their natural order, and explaining, the several proceedings therein.

The court of king's bench, concerning the nature of which we partly inquired in the preceding book, was (we may remember) divided into a crown side and a plea side. And on the crown side, or crown office, it takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace. Into this court also indictment from all inferior courts may be removed by writ of certiorari, and tried either at bar, or at *nisi prius* (unless before), by a jury of the county out of which the indictment is brought.

The high court of parliament is the supreme court in the kingdom, not only for the making, but also for the execution, of laws: by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attaint particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro ne nata* (for present emergency), and by no means an execution of such as are already in being. But an impeachment before the lords by the commons of Great Britain, in

parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom. The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords; who are, in cases of misdemeanors, considered not only as their own peers, but as the peers of the whole nation.

The courts of oyer and terminer and the general goal delivery, which are held before the king's commissioners, among whom are usually two judges of the courts at Westminster, twice in every year in every county of the kingdom; except the four northern ones, where they are held only once, and London and Middlesex, wherein they are held eight times. These were slightly mentioned in the preceding book. We then observed that, at what is usually called the assizes, the judges sit by virtue of five several authorities: two of which, the commission of assizes and its attendant jurisdiction of nisi prius, being principally of a civil nature, were then explained at large; to which I shall only add, that these justices have a criminal jurisdiction, also, by commissions of the peace, of oyer and terminer, to inquire, hear, and determine all treasons, felonies, and misdemeanors; and, fifthly, of a general gaol delivery, which empowers them to try and deliver every prisoner in the gaol.

The court of general quarter sessions of the peace is a court that must be held in every county once in every quarter of a year. It is held before two or more justices of the peace. The jurisdiction of this court, by statute 34 Edw. III, c. 1, extends to the trying and determining all felonies and trespasses whatsoever: though they seldom, if ever, try any greater offence than small felonies within the benefit of clergy; their commission providing, that if any case of difficulty arises, they shall not proceed to judgment, but in the presence of one of the justices of the court of king's bench or common pleas, or one of the judges of assize. And therefore, murders, and other capital felonies, are usually remitted for a more solemn trial to the assizes.

2. Conservators of the peace at common law.—The common law hath ever had a special care and regard for the conservation

of the peace; for peace is the very end and foundation of civil society. And, therefore, there were peculiar officers appointed by the common law for the maintenance of the public peace. The king's majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it; hence it is usually called the king's peace. The lord chancellor, or keeper, the lord treasurer, the lord high steward of England, the lord mareschal, the lord high constable of England (when any such officers are in being), and all the justices of the court of king's bench (by virtue of their offices), and the master of the rolls (by prescription), are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it: the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county; as is also the sheriff; and both of them may take a recognizance or security for the peace. Constables, tything-men, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace and commit them, till they find sureties for their keeping it.

3. **Justices of the peace.**—The power, office, and duty of a justice of the peace depend on his commission, and on the several statutes which have created objects of his jurisdiction. His commission first empowers him singly to conserve the peace;. and thereby gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offences, which is the ground of their jurisdiction at sessions, of which more will be said in its proper place.

4. **The sheriff's authority.**—As the keeper of the king's peace, both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein, during his office. He may apprehend, and commit to prison, all persons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the king's peace. He may, and is bound ex officio to pursue, and take all traitors, murderers, felons, and other misdoers, and commit

them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse commitatus*, or power of the county: and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning, under pain of fine and imprisonment. But though the sheriff is thus the principal conservator of the peace in his county, yet by the express directions of the great charter, he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown, or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office: for this would be equally inconsistent; he being in many respects the servant of the justices. In his ministerial capacity the sheriff is bound to execute all process issuing from the king's courts of justice. In the commencement of civil causes he is to serve the writ, to arrest, and to take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution. In criminal matters, he also arrests and imprisons; he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extend to death itself.

To execute these various offices, the sheriff has under him many inferior officers; an under-sheriff, bailiffs, and gaolers; who must neither buy, sell, nor farm their offices, on forfeiture of 500*l.*

Deputies. The under-sheriff usually performs all the duties of the office; a very few only excepted, where the personal presence of the high sheriff is necessary.

5. The coroner.—The coroner's is also a very ancient office at the common law. He is called coroner, coronator, because he hath principally to do with pleas of the crown, or such wherein the king is more immediately concerned. And in this light the lord chief justice of the king's bench is the principal coroner

in the kingdom; and may, if he pleases, exercise the jurisdiction of a coroner in any part of the realm. But there are also particular coroners for every county of England, usually four, but sometimes six, and sometimes fewer. This office is of equal antiquity with the sheriff; and was ordained together with him to keep the peace, when the earls gave up the wardship of the county. One of the duties of the coroner is that of holding inquests, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be *"super visum corporis"* (on the view of the body); for, if the body be not found, the coroner cannot sit.

He must also sit at the very place where the death happened; and his inquiry is made by a jury from four, five, or six, of the neighboring towns, over whom he is to preside. If any be found guilty by this inquest, of murder or other homicide, he is to commit them to prison for farther trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby, and must certify the whole of this inquisition (under his own seal and the seals of his jurors, together with the evidence thereon), to the court of king's bench, or the next assizes.

The ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff, for suspicion of partiality (as that he is interested in the suit, or of kindred to either plaintiff or defendant), the process must then be awarded to the coroner, instead of the sheriff, for execution of the king's writs.

6. Constables.—The general duty of all constables, both high and petty, as well as of the other officers, is to keep the king's peace in their several districts; and to that purpose they are armed with very large powers, of arresting and imprisoning, of breaking open houses, and the like; of the extent of which powers, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance. One of their principal duties, arising from the statute of Winchester, which appoints them, is to keep watch and ward in their respective jurisdictions. Ward, guard, or *custodia* is chiefly applied to the daytime, in order to apprehend rioters, and robbers on the highways; the manner of doing which is left to the discretion of the justices of the peace and

the constable: the hundred being however, answerable for all robberies committed therein, by daylight, for having kept negligent guard. Watch is properly applicable to the night only (being called among our Teutonic ancestors *wacht* or *watca,* and it begins at the time when ward ends, and ends when that begins; for, by the statute of Winchester, in walled towns the gates shall be closed from sunsetting to sunrising, and watch shall be kept in every borough and town especially in the summer season, to apprehend all rogues, vagabonds, and nightwalkers, and make them give an account of themselves. The constable may appoint watchmen at his discretion, regulated by the custom of the place; and these, being his deputies, have for the time being the authority of their principal.

7. **The means of preventing offences.**—It is an honor, and almost a singular one, to our English laws, that they furnish a title of this sort; since preventive justice is, upon every principle of reason, of humanity, and sound policy, preferable in all respects to punishing justice; the executon of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

This preventive justice consists in obliging those persons whom there is a probable ground to suspect of future misbehavior, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behavior. This requisition of sureties has been several times mentioned before, as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors; but there, also, it must be understood rather as a caution against a repetition of the offence, than any immediate pain or punishment. And, indeed, if we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past; since, as was observed in a former chapter, all punishments inflicted by temporal laws may be classed under three heads: such as to tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example; all of which conduce to one and the same end, of preventing future crimes, whether that can be effected by amend-

ment, disability, or example. But the caution that we speak of at present is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless, perhaps, for a man's imprudence in giving just ground of apprehension. Let us, therefore, consider first what this security is; next, who may take or demand it; and, lastly, how it may be discharged.

8. **Binding with sureties.**—This security consists in being bound, with one or more securities, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the crown in the sum required (for instance, 100*l.*), with condition to be void and of none effect if the party shall appear in court on such a day, and in the mean time shall keep the peace; either generally towards the king and all his liege people; or, particularly also, with regard to the person who craves the security. Or, if it be for the good behavior, then on condition that he shall demean and behave himself well (or be of good behavior), either generally or specially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a justice of the peace, must be certified to the next sessions, in pursuance of the statute 3 Hen. VII, c. 1, and if the condition of such recognizance be broken, by any breach of the peace in the one case, or any misbehavior in the other, the recognizance becomes forfeited or absolute; and being *estreated* or extracted (taken out from among the other records) and sent up to the exchequer, the party and his sureties, having now become the king's absolute debtors, are sued for the several sums in which they are respectively bound.

Who may require recognizance. Any justices of the peace, by virtue of their commission, or those who are *ex officio* (officially) conservators of the peace, as was mentioned in a former volume, may demand such security according to their own discretion; or it may be granted at the request of any subject, upon due cause shown, provided such demandant be under the king's protection. Wives may demand it against their husbands; or husbands, if necessary, against their wives. But feme coverts,

and infants under age, ought to find security by their friends only, and not to be bound themselves: for they are incapable of engaging themselves to answer any debt; which, as we observed, is the nature of these recognizances or acknowledgments.

How discharged. A recognizance may be discharged, either by the demise of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such recognizance is certified by the justices (as the quarter sessions, assizes, or king's bench), if they see sufficient cause; or in case he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued.

Thus far what has been said is applicable to both species of recognizance, for the peace, and for the good behavior: "*de pace, et legalitate, tuenda,*" as expressed in the laws of King Edward. But as these two species of securities are in some respects different, especially as to the cause of granting, or the means of forfeiting them, I shall now consider them separately: and, first, shall show for what cause such a recognizance, with sureties for the peace, is grantable; and then, how it may be forfeited.

9. To keep the peace.—Any justice of the peace may, ex officio, bind all those to keep the peace, who in his presence make any affray: or threaten to kill or beat another; or contend together with hot and angry words; or go about with unusual weapons or attendance, to the terror of the people; and all such as he knows to be common barretors; and such as are brought before him by the constable for a breach of peace in his presence; and all such persons, as, having been before bound to the peace, have broken it and forfeited their recognizances. Also, wherever any private man hath just cause to fear that another will burn his house, or do him a corporal injury, by killing, imprisoning, or beating him; or that he will procure others so to do; he may demand surety of the peace against such person: and every justice of the peace is bound to grant it, if he who demands it will make oath that he is actually under fear of death or bodily harm; and will show that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him; and will also further swear, that he does

not require such surety out of malice, or for mere vexation. This is called swearing the peace against another: and, if the party does not find such sureties, as the justice in his discretion shall require, he may immediately be committed till he does.

Forfeiture of recognizance. Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault, or menace, to the person of him who demanded it, if it be a special recognizance; or if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace; or more particularly, by any one of the many species of offences which were mentioned as crimes against the public peace in the eleventh chapter of this book; or by any private violence committed against any of his majesty's subjects. But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance. Neither are mere reproachful words, as calling a man a knave or liar, any breach of the peace, so as to forfeit one's recognizance (being looked upon to be merely the effect of unmeaning heat and passion), unless they amount to a challenge to fight.

10. Recognizance for good behavior.—The other species of recognizance, with sureties, is for the good abearance or good behavior. This includes security for the peace, and somewhat more; we will therefore examine it in the same manner as the other.

Forfeiture. A recognizance for the good behavior may be forfeited by all the same means as one for the security of the peace may be: and also by some others. As, by going armed, with unusual attendance, to the terror of the people; by speaking words tending to sedition; or by committing any of those acts of misbehavior which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen: for, though it is just to compel suspected persons to give security to the public against misbehavior that is apprehended; yet it would be hard, upon such suspicion, without proof of any actual crime, to punish them by a forfeiture of their recognizance.

CHAPTER XLIII.

CRIMINAL PLEADING AND PRACTICE.

1. **Arrest.**—We are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction; which may be distributed under twelve general heads, following each other in a progressive order, viz.: (1) Arrest; (2) Commitment and bail; (3) Prosecution; (4) Process; (5) Arraignment and its incidents; (6) Plea and issues; (7) Trial and conviction; (8) Judgment and its consequences; (9) Reversal of judgment; (10) Reprieve, or pardon; (11) Execution; all of which will be discussed in this chapter.

First, then, of an arrest, which is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable in all criminal cases; but no man is to be arrested unless charged with such a crime as will at least justify holding him to bail when taken. And, in general, an arrest may be made three ways: (1) By warrant; (2) By an officer without warrant; (3) By a private person also without warrant.

2. **Warrant, when issued.**—A warrant is granted ordinarily by justices of the peace. This they may do in any cases where they have a jurisdiction over the offence, in order to compel the person to appear before them; for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend, and submit to such examination. And this extends undoubtedly to all treasons, felonies, and breaches of the peace; and also to all such offences as they have power to punish by statute. Sir Edward Coke indeed hath laid it down that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till indictment be actually found: and the contrary practice is by others held to be grounded rather upon connivance than the express rule of law; though now by long custom established.

A doctrine which would in most cases give a loose to felons to escape without punishment; and therefore Sir Matthew Hale hath combated it with invincible authority and strength of reason: maintaining, (1) That a justice of the peace hath power to issue a warrant to apprehend a person accused of felony, though not yet indicted; and, (2) That he may also issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion.

But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there is a felony or other crime actually committed, without which no warrant should be granted; as also to prove the cause and probability of suspecting the party against whom the warrant is prayed. This warrant ought to be under the hand and seal of the justice, should set forth the time and place of making, and the cause for which it is made, and should be directed to the constable or other peace officer (or, it may be, to any private person by name), requiring him to bring the party either generally before any justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a special warrant.

General warrants illegal. A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: for the point upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. It is therefore in fact no warrant at all; for it will not justify the officer who acts under it: whereas, a warrant properly penned (even though the magistrate who issues it should exceed his jurisdiction), will, by statute 24 Geo. II, c. 44, at all events indemnify the officer who executes the same ministerially. And when a warrant is received by the officer he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief or other justice

of the court of king's bench extends all over the kingdom: and is *teste'd* or dated, England; not Oxfordshire, Berks, or other particular county. But a warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed there.

3. Arrests without warrant.—Arrests by officers without warrant may be executed, (1) By a justice of the peace; who may himself apprehend or cause to be apprehended by word only, any person committing a felony or breach of the peace in his presence. (2) The sheriff; and (3) The coroner, may apprehend any felon within the county without warrant. (4) The constable, of whose office we formerly spoke, hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace, committed in his view, and carry him before a justice of the peace. And in case of felony actually committed, or a dangerous wounding, whereby felony is like to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken; and, if he or his assistants be killed in attempting such arrests, it is murder in all concerned.

Arrest by private person. Any private person (and *a fortiori*, a peace officer) that is present when any felony is committed, is bound by the law to arrest the felon, on pain of fine and imprisonment, if he escapes through the negligence of the standers-by. And they may justify breaking open the doors upon following such felon; and if they kill him, provided he cannot be otherwise taken, it is justifiable: though if they are killed in endeavoring to make such arrest, it is murder. Upon probable suspicion also a private person may arrest the felon, or other person so suspected. But he cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter, and no more. It is no more, because there is no malicious design to kill: but it amounts to so much, because it would be of most pernicious consequence, if, under pretence of suspecting felony, any private person might break open a house, or kill another; and also because such arrest, upon suspicion, is barely permitted by the law, and not

enjoined, as in the case of those who are present when a felony is committed.

4. Commitment and bail.—When a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace: and how he is there to be treated, I shall next show, under the second head, of commitment and bail.

Preliminary examination. The justice, before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged: and to this end by statute 2 and 3 P. and M. c. 10, he is to take in writing the examination of such prisoner, and the information of those who bring him: which, Mr. Lambard observes, was the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum* (no one was obliged to betray himself): and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men. If upon this inquiry it manifestly appears that either no such crime was committed, or that suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail: that is, put in securities for his appearance, to answer the charge against him.

5. Admission to bail.—This commitment, therefore, being only for safe custody, wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes: but in felonies, and other offences of a capital nature, no bail can be security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit, to save his own life? and what satisfaction or indemnity is it to the public, to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity? Upon a principle similar to which the Athenian magistrates, when they took a solemn oath never to keep a citizen in bonds that could give three sureties of the same quality with himself, did it with an exception to such as had embezzled the public money or been guilty of treasonable practices. What the nature of bail is hath been shown in the preceding book, viz., a delivery or bailment, of a person to his sureties, upon their giving (together with himself) sufficient

security for his appearance: he being supposed to continue in their friendly custody, instead of going to gaol. In civil cases we have seen that every defendant is bailable; but in criminal matters it is otherwise. Let us therefore inquire in what cases the party accused ought, or ought not, to be admitted to bail.

Right to bail. And, first, to refuse or delay to bail any person bailable is an offence against the liberty of the subject, in any magistrate by the common law, as well as by the statute Westm. 1, 3 Edw. I, c. 15, and the habeas corpus act, 31 Car. II, c. 2.

Excessive bail. And, lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute 1 W. and M., st. 2, c. 2, that excessive bail ought not to be required; though what bail should be called excessive must be left to the courts, on considering the circumstances of the case, to determine. And, on the other hand, if the magistrate takes insufficient bail he is liable to be fined, if the criminal doth not appear. Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate, but most usually by the justices of the peace. Regularly, in all offences either against the common law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special act of parliament. In order, therefore, more precisely to ascertain what offences are bailable,

Offences not bailable. Let us next see, who may not be admitted to bail, or what offences are not bailable. And here I shall not consider any one of these cases in which bail is ousted by statute, from prisoners convicted of particular offences: for then such imprisonment without bail is part of their sentence and punishment. But, where the imprisonment is only for safe custody before the conviction, and not for punishment afterwards, in such cases bail is ousted or taken away, wherever the offence is of a very enormous nature; for then the public is entitled to demand nothing less than the highest security that can be given, viz., the body of the accused; in order to insure that justice shall be done upon him if guilty. Such persons, therefore, as the author of the Mirror observes, have no other sureties but the four walls of the prison. By

the ancient common law, before and since the Conquest, all felonies were bailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case.

Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* (we send or commit) of the justice, or warrant under his hand and seal, containing the cause of his commitment: there to abide till delivered by due course of law. But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement only; though what are so requisite must too often be left to the discretion of the gaolers; who are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation. Yet the law (as formerly held) would not justify them in fettering a prisoner, unless where he was unruly, or had attempted to escape.

6. **Indictment, or formal accusation.**—The next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. And this is either upon a previous finding of the fact by an inquest or grand jury; or without such previous finding.

An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things which, on the part of our lord the king, shall then and there be commanded them. This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution:

for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine that might be applied to very oppressive purposes.

Venue. The grand jury are sworn to inquire, only for the body of the county, pro corpore comitatus; and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by an act of parliament. But, in general, all offences must be inquired into, as well as tried, in the county where the fact is committed. Yet, if larceny be committel in one county, and the goods carried into another, the offender may be indicted in either; for the offence is committed in both. Or he may be indicted in England for larceny in Scotland, and carrying the goods with him into England, or vice versa; or for receiving in one part of the united kingdom goods that have been stolen in another. But for robbery, burglary, and the like, he can only be indicted where the fact was actually committed; for though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore larceny in the second county, yet it is not a robbery or burglary in that jurisdiction.

Finding the indictment. When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, *"ignoramus";* or, we know nothing of it: intimating, that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English more absolutely, "not a true bill"; or (which is the better way) "not found"; and then the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then endorse upon it, "a true bill;" anciently *"billa vera."* The indictment is then said to be found, and the party stands indicted. But to find a bill there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any

capital offence, unless by the unanimous voice of twenty-four of his equals and neighbors: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation: and afterwards, by the whole petit jury, of twelve more, finding him guilty, upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree. And the indictment, when so found, is publicly delivered into court.

7. **Technicalities of criminal pleading of indictment.**—Indictments must have a precise and sufficient certainty. By statute 1 Hen. V, c. 5, all indictments must set forth the christian name, sirname, and addition of the state, and degree, mystery, town or place, and county of the offender: and all this to identify his person. The time and place are also to be ascertained by naming the day and township, in which the fact was committed; though a mistake in these points is in general not held to be material, provided the time be laid previous to the finding of the indictment, and the place to be within the jurisdiction of the court; unless where the place is laid, not merely as a venue, but as a part of the description of the fact. But sometimes the time may be very material, where there is any limitation in point of time assigned for the prosecution of offenders: as by statute 7 Wm. III, c. 3, which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned (except an assassination designed or attempted on the person of the king), unless the bill of indictment be found within three years after the offence committed: and in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given.

Apt words. The offence itself must be set forth with clearness and certainty; and in some crimes particularly words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done, "treasonably and against his allegiance," else the indictment is void. In indictments for murder, it is necessary to say that the party indicted "murdered," not "killed," or "slew," the other. In all indictments for felonies, the adverb "feloniously," must be used; and for burglaries also "*burglariter*," or in

English, "burglariously:" and all these to ascertain the intent. In rapes, the word "ravished" is necessary, and must not be expressed by any periphrasis; in order to render the crime certain. So in larcenies also the words "feloniously took and carried away," are necessary to every indictment: for these can only express the very offence. Also in indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature; but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also where a limb, or the like, is absolutely cut off, there such description is impossible.

Allegation of value. Lastly, in indictments the value of the thing, which is the subject or instrument of the offence, must sometimes be expressed. In indictments for larcenies this is necessary, that it may appear whether it be grand or petit larceny; and whether entitled or not to the benefit of clergy; in homicides of all sorts it is necessary; as the weapon with which it is committed is forfeited to the king as a deodand.

8. In cases of high treason.—It is enacted by statute 7 Wm. III, c. 3, first, that no person shall be tried for any such treason, except an attempt to assassinate the king, unless the indictment be found within three years after the offence committed: next, that the prisoner shall have a copy of the indictment (which includes the caption), but not the names of the witnesses, five days at least before the trial; that is, upon the true construction of the act, before his arraignment; for then is his time to take any exceptions thereto, by way of plea or demurrer; thirdly, that he shall also have a copy of the panel of jurors two days before his trial; and, lastly, that he shall have the same compulsive process to bring in his witnesses for him as was usual to compel their appearance against him.

9. Prosecution by information.—The remaining methods of prosecution are without any previous finding by a jury, to fix the authoritative stamp of verisimilitude upon the accusation. One of these by the common law, was when a thief was taken with the mainour, that is, with the thing stolen upon him *in manu* (in his hand). For he might, when so detected *flagrante delicto* (in open crime), be brought into court, arraigned, and tried, without indictment: as by the Danish law he might be taken and hanged

upon the spot, without accusation or trial. [This is long since obsolete.] But these informations are confined by the constitutional law to mere misdemeanors only: for, wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men; before the party shall be put to answer it. So that the only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury, now seems to be that of information. When the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be arraigned thereon; which is the fifth stage of criminal prosecution.

10. The arraignment.—To arraign is nothing else but to call the prisoner to the bar of the court to answer the matter charged upon him in the indictment. The prisoner is to be called to the bar by his name; and it is laid down in our ancient books that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds: unless there be evident danger of an escape, and then he may be secured with irons. But yet in Layer's case, A. D. 1722, a difference was taken between the time of arraignment and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment.

Identifying the prisoner. When he is brought to the bar, he is called upon by name to hold up his hand; which, though it may seem a trifling circumstance, yet is of this importance, that, by the holding up of his hand, *constat de persona* (there is evidence of the person), and he owns himself to be of that name by which he is called. However, it is not an indispensable ceremony; for, being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well; therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient.

Reading the indictment. Then the indictment is to be read to him distinctly in the English tongue (which was law, even while all other proceedings were in Latin), that he may fully understand his charge. After which it is to be demanded of him whether he be guilty of the crime whereof he stands indicted, or not guilty.

Effect of silence or confession. When a criminal is arraigned, he either stands mute, or confesses the fact; which circumstances we may call incidents to the arraignment: or else he pleads to the indictment, which is to be considered as the next stage of proceedings. If the prisoner upon his arraignment stands mute, the court will order a plea of non-guilty to be entered on the minutes.

Upon a simple and plain confession, the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment.

11. Pleading to the indictment.—We are now to consider the plea of a prisoner, or defensive matter alleged by him on his arraignment, if he does not confess or stand mute. This is either, (1) a plea to the jurisdiction; (2) a demurrer; (3) a plea in abatement; (4) a special plea in bar; or (5) the general issue.

(1) *A plea to the jurisdiction,* is where an indictment is taken before a court that hath no cognizance of the offence; as if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions: in these, or similar cases, he may except to the jurisdiction of the court, without answering at all to the crime alleged.

(2) *A demurrer to the indictment.* This is incident to criminal cases, as well as civil, when the fact as alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. Thus, for instance, if a man be indicted for feloniously stealing a greyhound; which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass, to steal it: in this case the party indicted may demur to the indictment; denying it to be felony, though he confesses the act of taking it. Some have held, that if, on demurrer, the point of law be adjudged against the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others, who hold, that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him. Which appears the more reasonable,

because it is clear that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony or no; and upon the fact thus shown it appears to be felony; the court will not record the confession; but admit him afterwards to plead not guilty. And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and though a man by mispleading may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used: since the same advantages may be taken upon a plea of not guilty; or afterwards in arrest of judgment, when the verdict has established the fact.

(3) *A plea in abatement* is principally for a misnomer, a wrong name, or a false addition to the prisoner. As, if James Allen, gentleman, is indicted by the name of John Allen, esquire, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire. And if either fact is found by a jury, then the indictment shall be abated, as writs or declarations may be in civil actions; of which we spoke at large in a preceding part. But, in the end, there is little advantage accruing to the prisoner by means of these dilatory pleas; because, if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he who takes advantage of a flaw must at the same time show how it may be amended. Let us therefore next consider a more substantial kind of plea, viz.:

12. Affirmative pleas in bar.—Special pleas in bar, which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas, which may be pleaded in bar of an appeal; but these are applicable to both appeals and indictments.

Plea of former acquittal. First, the plea of *autrefoits acquit* (or a former acquittal), is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. And hence it is allowed as a consequence, that when a man is once

fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.

Former conviction. Secondly, the plea of *autrefoits convict,* or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held, that a conviction of manslaughter is a bar to an indictment of murder; for the fact prosecuted is the same in both, though the offences differ in coloring and in degree. It is to be observed, that the pleas of *autrefoits acquit* and *autrefoits convict,* or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime.

Pardon. Lastly, a pardon may be pleaded in bar; as at once destroying the end and purpose of the indictment, by remitting that punishment which the prosecution is calculated to inflict. There is one advantage that attends pleading a pardon in bar, or in arrest of judgment, before sentence is past; which gives it by much the preference to pleading it after sentence or attainder. This is, that by stopping the judgment it stops the attainder, and prevents the corruption of the blood; which, when once corrupted by attainder, cannot afterwards be restored, otherwise than by act of parliament. But as the title of pardons is applicable to other stages of prosecution; and they have their respective force and efficacy, as well after as before conviction, outlawry, or attainder; I shall therefore reserve the more minute consideration of them till I have gone through every other title except only that of execution.

Several pleas allowed. Before I conclude this head of special pleas in bar, it will be necessary once more to observe, that though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another if that be determined against him; (as if, on an action of debt, the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, *nil debet* (he owes nothing), as he might at first: for he

has made his election what plea to abide by, and it was his own folly to choose a rotten defence;) though, I say, this strictness is observed in civil actions, *quia interest reipublicæ ut sit finis litium* (because it is for the public good that there be an end to contentions); yet in criminal prosecutions *in favorem vitæ* (from a regard to life), as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court; still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty. For the law allows many pleas, by which a prisoner may escape death; but only one plea, in consequence whereof it can be inflicted: viz., on the general issue, after an impartial examination and decision of the fact, by the unanimous verdict of a jury. It remains, therefore, that I consider

13. The general issue.—The general issue, or plea of not guilty, upon which plea alone the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot plead that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, not guilty, and give this special matter in evidence. For (besides that these pleas do in effect amount to the general issue; since, if true, the prisoner is most clearly not guilty) as the facts in treason are laid to be done *proditorie et contra ligeantiæ suæ debitum* (traitorously and against his due allegiance), and, in felony, that the killing was done feloniously, these charges of a traitorous or felonious intent, are the points and very gist of the indictment, and must be answered directly, by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner.

When the prisoner hath thus pleaded not guilty, the clerk of the assizes, or clerk of the arraigns, on behalf of the crown replies, that the prisoner is guilty, and that he is ready to prove him so. This is therefore a replication on behalf of the king viva voce (by word of mouth) at the bar; which was formerly

the course in all pleadings, as well in civil as in criminal causes. By this replication the king and the prisoner are therefore at issue; for we may remember in our strictures upon pleadings, it was observed, that when the parties come to a fact, which is affirmed on one side and denied on the other, then they are said to be at issue in point of fact.

When the prisoner has thus put himself upon his trial, the clerk answers in the humane language of the law, which always hopes that the party's innocence rather than his guilt may appear, "God send thee a good deliverance." And then they proceed, as soon as conveniently may be, to the trial; the manner of which will be next considered.

14. Selecting the jury.—What was said of juries in general, and the trial thereby, in civil cases, will greatly shorten our present remarks, with regard to the trial of criminal suits, which trial I shall consider in the same method that I did the former; by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

When, therefore, a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto:* that is, freeholders, without just exception, and of the visne or neighborhood; which is interpreted to be of the county where the fact is committed. When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party. Challenges may here be made, either on the part of the king, or on that of the prisoner; and either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes. For it is here at least as necessary, as there, that the sheriff or returning officer be totally indifferent; and that the particular jurors should be not liable to objection either *propter honoris respectum, propter defectum, propter affectum,* or *propter delictum* (on account of dignity, on account of incompetency, on account of partiality, on account of the commission of some offence).

Challenges for cause. Challenges upon any of the foregoing accounts are styled challenges for cause; which may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is, *in favorem vitæ* (from a regard

to life), allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a peremptory challenge: a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous. This is grounded on two reasons. (1) As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. (2) Because upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

Peremptory challenges. The privilege of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I, st. 4, which enacts, that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However, it is held that the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the person so challenged. And then, and not sooner, the king's counsel must show the cause: otherwise the juror shall be sworn.

The peremptory challenges of the prisoner must, however, have some reasonable boundary; otherwise he might never be tried. This reasonable boundary is settled by the common law to be the number of thirty-five; that is, one under the number of three full juries. For the law judges that five-and-thirty are fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all.

If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a tales may be awarded as in civil causes, till the number of twelve is

sworn, "well and truly to try, and true deliverance make, between our sovereign lord the king, and the prisoner whom they have in charge; and a true verdict to give according to the evidence."

15. Order of trial—Counsel.—When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshaled, examined, and enforced by the counsel for the crown or prosecution. But it was formerly a settled rule at common law, that no counsel should be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner: that is, shall see that the proceedings against him are legal and strictly regular) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?

16. Evidence in criminal cases.—The doctrine of evidence upon pleas of the crown is, in most respects, the same as that upon civil actions. There are, however, a few leading points, wherein, by several statutes, and resolutions, a difference is made between civil and criminal evidence.

Number of witnesses. First, in all cases of high treason, petit treason, and misprision of treason, by statutes 1 Edw. VI, c. 12, and 5 and 6 Edw. VI, c. 11, two lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence confess the same. But by statute 7 Wm. III, c. 3, in prosecutions for those treasons to which that extends, the same rule (of requiring two witnesses) is again enforced; with this addition, that the confession of the prisoner, which shall countervail the necessity of such proof, must be in open court.

Confessions. In the construction of which act it hath been holden, that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty, unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. And, indeed, even in cases of felony at the

common law, they are the weakest, and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. By the same statute 7 Wm. III, it is declared, that both witnesses must be to the same overt act of treason, or one to one overt act, and the other to another overt act, of the same species of treason, and not of distinct heads or kinds: and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. And, therefore, in Sir John Fenwick's case in King William's time, where there was but one witness, an act of parliament was made on purpose to attaint him of treason, and he was executed. But in almost every other accusation one positive witness is sufficient. Baron Montesquieu lays it down for a rule, that those laws which condemn a man to death in any case on the deposition of a single witness, are fatal to liberty; and he adds this reason, that the witness who affirms, and the accused who denies, make an equal balance; there is a necessity, therefore, to call in a third man to incline the scale.

But this seems to be carrying matters too far: for there are some crimes in which the very privacy of their nature excludes the possibility of having more than one witness; must these, therefore, escape unpunished? Neither, indeed, is the bare denial of the person accused equivalent to the positive oath of a disinterested witness. In cases of indictment for perjury, this doctrine is better founded; and there our law adopts it: for one witness is not allowed to convict a man indicted for perjury; because then there is only one oath against another. In cases of treason, also, there is the accused's oath of allegiance, to counterpoise the information of a single witness; and that may perhaps be one reason why the law requires a double testimony to convict him: though the principal reason, undoubtedly, is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

Handwriting. Secondly, though from the reversal of Colonel Sidney's attainder by an act of parliament in 1689, it may be collected, that the mere similitude of handwriting in two papers shown to a jury, without other concurrent testimony, is no evi-

dence that both were written by the same person; yet undoubtedly the testimony of witnesses, well acquainted with the party's hand, that they believe the paper to have been written by him is evidence to be left to a jury.

All circumstantial evidence of felony should be weighed cautiously; for the law holds that it is better that ten guilty persons escape, than that one innocent suffer. And Sir Matthew Hale in particular lays down two rules most prudent and necessary to be observed: (1) Never to convict a man for stealing the goods of a person unknown, merely because he will give no account of how he came by them, unless an actual felony be proved of such goods; and (2) never to convict any person of murder or manslaughter, till at least the body be found dead; on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing.

17. **The verdict.**—When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict; but are to consider of it, and deliver it in, with the same forms as upon civil causes; only they cannot, in a criminal case which touches life or member, give a privy verdict. But the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court. And such public or open verdict may be either general, guilty, or not guilty; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they doubt the matter of law, and therefore choose to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper to so hazard a breach of their oaths. Where contrary to evidence the jury have found the prisoner guilty, their verdict may be set aside, and a new trial granted by the court. But there hath yet been no instance of granting a new trial where the prisoner was acquitted upon the first.

If the jury, therefore, find the prisoner not guilty, he is then forever quit and discharged of the accusation. And upon such his acquittal, or discharge for want of prosecution, he shall

be immediately set at large without payment of any fee to the gaoler.

18. Restitution of stolen goods.—On a conviction of larceny, in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII, c. 11. For, by the common law, there was no restitution of goods upon an indictment, because it is at the suit of the king only; and therefore the party was enforced to bring suit, in order to have his goods again. But, it being considered that the party prosecuting the offender by indictment, deserves encouragement this statute was made, which enacts, that if any person be convicted of larceny, by the evidence of the party robbed, he shall have full restitution of his money, goods and chattels; or the value of them out of the offender's goods, if he has any, by a writ to be granted by the justices. And it is now usual for the court, upon the condition of a felon, to order, without any writ, immediate restitution of such goods as are brought into court, to be made to the several prosecutors. Or else, secondly, without such writ of restitution, the party may peaceably retake his goods, wherever he happens to find them, unless a new property be fairly acquired therein. Or, lastly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods; and recover a satisfaction in damages. But such action lies not before prosecution; for so felonies would be made up and healed: and also recaption is unlawful, if it be done with intention to smother or compound the larceny.

19. Compromising the punishment.—It is not uncommon, when a person is convicted of a misdemeanor, which principally and more immediately affects some individual, as a battery, imprisonment or the like, for the court to permit the defendant to speak with the prosecutor, before any judgment is pronounced; and if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action. But it surely is a dangerous practice; and though it may be intrusted to the prudence and discretion of the judges in the superior courts of record, it ought never to be allowed in local or inferior jurisdictions, such as the quarter sessions; where prosecutions for as-

saults are by these means too frequently commenced rather for private lucre than for the great ends of public justice. Above all, it should never be suffered where the testimony of the prosecutor himself is necessary to convict the defendant: for, by these means, the rules of evidence are entirely subverted; the prosecutor becomes in effect a plaintiff, and yet is suffered to bear witness for himself. Nay, even a voluntary forgiveness by the party injured ought not, in true policy, to intercept the stroke of justice. "This," says an elegant writer, who pleads with equal strength for the certainty as for the lenity of punishment, "may be an act of good nature and humanity, but is contrary to the good of the public. For, although a private citizen may dispense with satisfaction for his private injury, he cannot remove the necessity of public example. The right of punishing belongs not to any one individual in particular, but to the society in general, or the sovereign who represents that society: and a man may renounce his own portion of this right, but he cannot give up that of others."

20. Pronouncing judgment.—When, upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner, he is either immediately, or at a convenient time soon after, asked by the court if he has anything to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanor (the trial of which may, and does usually, happen in his absence, after he has once appeared), a capias is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry.

Arrest of judgment. But whenever he appears in person, upon either a capital or inferior conviction, he may, at this period, as well as at his arraignment, offer any exceptions to the indictment, in arrest or stay of judgment: as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again.

Technicalities may be interposed. And we may take notice, (1.) That none of the statutes of jeofails, for amendment of errors, extend to indictments or proceedings in criminal cases; and therefore a defective indictment is not aided by a verdict,

as defective pleadings in civil cases are. (2.) That, in favor of life, great strictness has at all times been observed, in every point of an indictment. Sir Matthew Hale indeed complains, "that this strictness is grown to be a blemish and inconvenience in the law, and the administration thereof: for that more offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence." And yet no man was more tender of life than this truly excellent judge.

The judgment of sentence. If all these resources fail, the court must pronounce that judgment which the law hath annexed to the crime, and which hath been constantly mentioned, together with the crime itself, in some or other of the former chapters. Of these, some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain or disgrace, are superadded; as, in treasons of all kinds, being drawn or dragged to the place of execution.

21. Writ of error.—A judgment may be reversed by writ of error: which lies from all inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers; and may be brought for notorious mistakes in the judgment or other parts of the record: as, where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors; such as any irregularity, omission, or want of form in the process of outlawry, or proclamations; the want of a proper addition to the defendant's name, according to the statute of additions; for not properly naming the sheriff or other officer of the court, or not duly describing where his county court was held; for laying an offence committed in the time of the late king, to be done against the peace of the present; and for many other similar causes, which (though allowed out of tenderness to life and liberty) are not much to the credit or advancement of the national justice. These writs of error, to reverse judgments in case of misdemeanors, are not to be allowed of course, but on sufficient probable cause shown to the attorney-general; and then they are understood to be grantable of common right, and *ex debito justitiæ* (as a matter of right).

22. Reprieves and pardons.—The only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

A reprieve, from *reprendre,* to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first, *ex arbitrio judicis* (at the will of the judge); either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favorable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commission expired; but this rather by common usage, than of strict right. Reprieves may also be *ex necessitate legis* (from legal necessity): as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis* (in favor of the offspring).

Another cause of regular reprieve is, if the offender becomes *non compos* between the judgment and the award of execution: for regularly, as was formerly observed, though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for *"furiosus solo furore punitur"* (a madman is punished by his madness alone), and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings.

Pardon. If neither pregnancy, insanity, non-identity, nor other plea, will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious pardon; the granting of which is the most amiable prerogative of the crown. Law (says an able writer) cannot be framed on principles of compassion to guilt;

yet justice, by the constitution of England, is bound to be administered in mercy; this is promised by the king in his coronation oath, and it is that act of his government which is the most personal; and most entirely his own. The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is mercy.

A pardon may also be conditional; that is, the king may extend his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend; and this by the common law.

PART IX

CONSTITUTIONAL LAW

CHAPTER XLIV.

BASIS AND FORMS OF GOVERNMENT.

1. **A state as a political association.**—A state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any natural union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a political union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted; and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be law.

This naturally leads us into a short inquiry concerning the nature of society and civil government; and the natural inherent right that belongs to the sovereignty of a state, wherever that sovereignty may be lodged, of making and enforcing laws.

Theory of a social compact. The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society either natural or civil; and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and

chose the tallest man present to be their governor. This notion of an actually existing unconnected state of nature, is too wild to be seriously admitted: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first natural society among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appeared to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact.

But though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the sense of their weakness and imperfection that keeps mankind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole, or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.

2. Who is entitled to govern.—For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define

their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be intrusted? To this the general answer is easy: but the application of it to particular cases has occasioned one-half of those mischiefs which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons in whom those qualities are most likely to be found, the perfection of which is among the attributes of Him who is emphatically styled the Supreme Being; the three grand requisites, I mean, of wisdom, of goodness, and of power; wisdom, to discern the real interest of the community; goodness, to endeavor always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well constituted frame of government. For the true idea of government and magistracy will be found to consist in this, that some few men are deputed by many others to preside over public affairs, so that individuals may the better be enabled to attend their private concerns.

3. **Sovereignty.**—How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

Forms of government. The political writers of antiquity will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy; the last, when it is intrusted in the hands of a single person,

and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

Sovereign power. By the sovereign power,[1] as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

4. Merits of different forms of government.—In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In aristocracies there is more wisdom to be found, than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens: but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any; for, by the entire conjunction of the legislative and executive powers, all the sinews of government are knit together, and united in the hand of the prince: but then there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution.

[1] [The term "Sovereignty" is used confusingly in various meanings, but should be confined to that of the ultimate political authority to establish government, the source of which in American political theory is the people.]

Fourth form—Mixed. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three: for though Cicero declares himself of opinion, *"esse optime constitutam rempublicam quæ ex tribus generibus illis, regali, optimo, et populari, sit modice confusa"* (that the best constituted republic, is that which is duly compounded of these three estates, the monarchical, aristocratical, and democratical); yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure.

5. The British a mixed constitution.—But, happily for us of this island, the British constitution has long remained, and I trust will long continue, a standing exception to the truth of this observation. For, as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy: and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valor, or their property; and, thirdly, the House of Commons, freely chosen by the people from among themselves, which makes it a kind of democracy: as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of everything; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think expedient or dangerous.

Parliamentary sovereignty—Checks and balances. Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government as well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the three principal ingredients of good polity; either virtue, wisdom

or power. If it were lodged in any two of the branches; for instance, in the king and house of lords, our laws might be providently made, and well executed, but they might not always have the good of the people in view; if lodged in the king and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power.

But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution. The legislature would be changed from that, which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society; and such a change, however effected, is, according to Mr. Locke (who perhaps carries his theory too far), at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.

6. American colonial government.—With respect to their interior polity, our colonies are properly of three sorts. (1.) Provincial establishments, the constitutions of which depend on the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions; under the authority of which, provincial assemblies are constituted, with the power of making local ordinances, not repugnant to the laws of England. (2.) Proprietary governments, granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of counties-palatine: yet still with these express conditions, that the ends for which the grant was made be substan-

tially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother country. (3.) Charter governments, in the nature of civil corporations, with the power of making by-laws for their own interior regulations, not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation. The form of government in most of them is borrowed from that of England. They have a governor named by the king, (or, in some proprietary colonies, by the proprietor,) who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the king and council here in England. Their general assemblies, which are their house of commons, together with their council of state, being their upper house, with the concurrence of the king, or his representative the governor, make laws suited to their own emergencies.

But it is particularly declared by statute 7 and 8 W. III, c. 22, that all laws, by-laws, usages and customs, which shall be in practice in any of the plantations, repugnant to any law, made or to be made in this kingdom relative to the said plantations, shall be utterly void and of none effect. And, because several of the colonies had claimed a sole and exclusive right of imposing taxes upon themselves, the statute 6 Geo. III, c. 12, expressly declares, that all his majesty's colonies and plantations in America have been, are, and of right ought to be, subordinate to and dependent upon the imperial crown and parliament of Great Britain; who have full power and authority to make laws and statutes of sufficient validity to bind the colonies and people of America, subjects of the crown of Great Britain in all cases whatsoever. And this authority has been since very forcibly exemplified and carried into act, by the statute 7 Geo. III, c. 59, for suspending the legislation of New York; and by several subsequent statutes.

7. **Local subdivision of England.**—The territory of England is liable to two divisions; the one ecclesiastical, the other civil.

(1) *The ecclesiastical division* is primarily, into two provinces, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan bishops; whereof Canterbury includes twenty-one, and York three: besides the bishopric of the

Isle of Man, which was annexed to the province of York by King Henry VIII. Every diocese is divided into archdeaconries, whereof there are sixty in all; each archdeaconry into rural deaneries, which are the circuit of the archdeacon's and rural dean's jurisdiction, of whom hereafter; and every deanery is divided into parishes.

A parish is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein. These districts are computed to be near ten thousand in number.

(2) *The civil division* of the territory of England is into counties, of those counties into hundreds, of those hundreds into tithings or towns. Which division, as it now stands, seems to owe its original to King Alfred, who, to prevent the rapines and disorders which formerly prevailed in the realm, instituted tithings, so called from the Saxon, because ten freeholders, with their families, composed one. These all dwelt together, and were sureties or free pledges to the king for the good behavior of each other; and, if any offence was committed in their district, they were bound to have the offender forthcoming. And therefore anciently no man was suffered to abide in England above forty days, unless he were enrolled in some tithing or decennary. One of the principal inhabitants of the tithing is annually appointed to preside over the rest, being called the tithing-man, the headborough, (words which speak their own etymology,) and in some counties the borsholder, or borough's-ealder, being supposed the discreetest man in the borough, town, or tithing.

Tithings, towns, or vills, are of the same signification in law; and are said to have had, each of them, originally a church and celebration of divine service, sacraments, and burials: though that seems to be rather an ecclesiastical, than a civil distinction. The word town or *vill* is, indeed, by the alteration of times and language, now become a generical term, comprehending under it the several species of cities, boroughs, and common towns.

A city is a town incorporated, which is or hath been the see of a bishop; and though the bishopric be dissolved, as at Westminster, yet still it remaineth a city.

A borough is now understood to be a town, either corporate or not, that sendeth burgesses to parliament.

As ten families or freeholders made up a town or tithing, so

ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is governed by an high constable, or bailiff, and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse. In some of the more northern counties these hundreds are called wapentakes.

County or shire. An indefinite number of these hundreds make up a county or shire. Shire is a Saxon word signifying a division; but a county, comitatus, is plainly derived from comes, the count of the Franks; that is, the earl, or alderman (as the Saxons called him) of the shire, to whom the government of it was intrusted. This he usually exercised by his deputy, still called in Latin vice-comes, and in English the sheriff, shrieve, or shire-reeve, signifying the officer of the shire, upon whom, by process of time, the civil administration of it is now totally devolved. In some counties there is an intermediate division between the shire and the hundreds, as lathes in Kent, and rapes in Sussex, each of them containing about three or four hundreds apiece.

Cities as counties. There are also counties corporate, which are certain cities and towns, some with more, some with less territory annexed to them; to which, out of special grace and favor, the kings of England have granted the privilege to be counties of themselves, and not to be comprised in any other county; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Bristol, Norwich, Coventry, and many others.

CHAPTER XLV.

MEMBERSHIP IN THE STATE: CITIZENS, OR SUBJECTS AND ALIENS, AND THEIR RELATION TO THE STATE.

1. Allegiance and fealty.—Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived from the relation of feudal subjection. Under the feudal system, every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them: and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him, and on the other hand, that the vassal should be faithful to the lord, and defend him against all his enemies. This obligation on the part of the vassal was called his *fidelitas*, or fealty; and an oath of fealty was required by the feudal law, to be taken by all tenants to their landlord, which is couched in almost the same terms as our ancient oath of allegiance; except that in the usual oath of fealty there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute power himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception: "*contra omnes homines fidelitatem fecit.*"

Tenure of the king becomes national allegiance. But with us in England, it becoming a settled principle of tenure that lands in the kingdom are holden of the king as their sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily con-

fined to the person of the king alone. By an easy analogy, the term of allegiance soon was brought to signify all other engagements which are due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered for upwards of six hundred years, contained a promise "to be true and faithful to the king and his heirs, and truth and faith to bear of life and limb and terrene honor, and not to know or hear of any ill or damage intended him, without defending him therefrom." Upon which Sir Matthew Hale makes this remark, that it was short and plain, not entangled with long or intricate causes or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. [Allegiance has thus evolved from a personal, private relation based on the tenure to render service in return for land, into a political relation covering one's rights and duties as a citizen or member of the state and nation.]

The oath of allegiance must be taken by all persons entering upon any public office, trust or employment.

2. Every subject or inhabitant owes allegiance without formal submission or oath.—But besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the crown, is fully invested with all the rights, and bound to all the duties, of sovereignty, before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing its performance. The formal profession, therefore, or oath of subjection, is nothing more than a declaration in words of what was before implied in law. Which occasions Sir Edward Coke very justly to observe, that "All subjects are equally bounden to their allegiance as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same." The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason: but it does not increase the civil

obligation to loyalty; it only strengthens the social tie by uniting it with that of religion.

3. Perpetual allegiance.—Allegiance, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection: at a time, too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature. An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now. For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural prince.

4. Local or temporary allegiance.—Local allegiance is such as is due from an alien or stranger born, for so long time as he continues within the king's dominion and protection: and it ceases the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local, temporary only; and that for this reason, evidently founded upon the nature of government; that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born sub-

jects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection of an alien, only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and, in point of locality, to the dominions of the British empire. From which considerations Sir Matthew Hale deduces this consequence, that though there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty to practice anything against his crown and dignity; wherefore, although the true prince regain the sovereignty, yet such attempts against the usurper (unless in defence or aid of the rightful king) have been afterwards punished with death; because of the breach of that temporary allegiance, which was due to him as king de facto. And upon this footing, after Edward IV recovered the crown, which had been long detained from his house by the line of Lancaster, treasons committed against Henry VI were capitally punished, though Henry had been declared an usurper by parliament.

In England allegiance retains a personal aspect. This oath of allegiance, or rather the allegiance itself, is held to be applicable not only to the political capacity of the king, or regal office, but to his natural person and blood-royal; and for the misapplication of their allegiance, viz.: to the regal capacity or crown, exclusive of the person of the king, were the Spencers banished in the reign of Henry II. And from hence arose that principle of personal attachment, and affectionate loyalty, which induced our forefathers (and, if occasion required, would doubtless induce their sons) to hazard all that was dear to them, life, fortune, and family, in defence and support of their liege lord and sovereign.

This allegiance, then, both express and implied, is the duty of all the king's subjects, under the distinctions here laid down, of local and temporary, or universal and perpetual. Their rights are also distinguishable by the same criterions of time and locality; natural-born subjects having a great variety of rights, which they acquire by being born within the king's ligeance, and can never forfeit by any distance of place or time, but only by their own misbehavior. The same is also in some degree the case of aliens; though their rights are much more circumscribed, being

acquired only by residence here, and lost whenever they remove. I shall however here endeavor to chalk out some of the principal lines, whereby they are distinguished from natives, descending to farther particulars when they come in course.

5. Rights and disabilities of aliens.—An alien born may purchase lands, or other estates: but not for his own use, for the king is thereupon entitled to them. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England, which would probably be inconsistent with that which he owes to his own natural liege lord: besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences. Wherefore by the civil law such contracts were also made void: but the prince had no such advantage of forfeiture thereby, as with us in England. Among other reasons which might be given for our constitution, it seems to be intended by way of punishment for the alien's presumption in attempting to acquire any landed property; for the vendor is not affected by it, he having resigned his right, and received an equivalent in exchange. Yet an alien may acquire a property in goods, money and other personal estate, or may hire a house for his habitation: for personal estate is of a transitory and movable nature; and besides, this indulgence to strangers is necessary for the advancement of trade. Aliens also may trade as freely as other people, only they are subject to certain higher duties at the custom-house; and there are also some obsolete statutes of Hen. VIII prohibiting alien artificers to work for themselves in this kingdom; but it is generally held that they were virtually repealed by statute 5 Eliz. c. 7. Also an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate: not as it is in France, where the king at the death of an alien is entitled to all he is worth, by the *droit d'aubaine* (the alien law).

6. Children of citizens born abroad.—[By the common law those born out of the king's dominions were aliens. But by various statutes children of English subjects born in foreign countries were allowed the rights of subjects.] And by several more modern statutes these restrictions are still farther taken off; so that all children, born out of the king's ligeance, whose fathers (or grandfathers by the father's side) were natural-born

subjects, are now deemed to be natural-born subjects themselves to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain. Yet the grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be protestants, and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such. In which the constitution of France differs from ours, for there if a child be born of foreign parents, it is an alien.

7. **Naturalization and denization.**—A denizen is an alien born, but who has obtained *ex donatione regis* (by the gift of the king) letters patent to make him an English subject: a high and incommunicable branch of the royal prerogative. A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance: for his parent, through whom he must claim, being an alien, had no inheritable blood; and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen, born before denization, cannot inherit to him; but his issue born after may. A denizen is not excused from paying the alien's duty, and some other mercantile burthens. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, etc., from the crown.

Naturalization cannot be performed but by act of parliament: for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy council, or parliament, holding offices, grants, etc.

CHAPTER XLVI.

CIVIL LIBERTY AND CIVIL RIGHTS.

1. Nature of liberty, civil and private.—[Civil liberty consists of the rights of individuals as protected against the united force of society, the governing power. Rights of citizens as against the government, called by Blackstone "Absolute Rights," are in general the same as rights of citizens against each other, except as affected by the due exercise of governmental power, known as due process of law.]

Private liberty. Natural liberty, from one point of view, consists in acting as one thinks fit, without any restraint or control. But absolute and uncontrolled freedom of action is limited, in the first place, by duties to consider the rights of others (private law), such mutual concessions being essential to co-operation in society and the advantages of civilized life. For if one man should have the wild and savage power of doing whatever he pleases, the consequence would be that every other man would have the same power, and then there would be no freedom or security to individuals in any of the enjoyments of life. To enjoy individual liberty, the natural liberty of all must be limited by justice to each and conformity to private law. Therefore, in so far as our private rights are protected against others, our private liberty is preserved. The law which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural liberty of the one, increases the private liberty of the others.

Public or civil liberty, and the governmental power. Natural liberty is limited, in the second place, by public law and the exercise of the powers of government. But the powers of government are themselves restrained and limited by public law, that they may be exercised so far (and no farther) than is necessary and expedient for the general advantage of the public. Every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popu-

lar assembly, is a degree of tyranny. Thus, even laws themselves, whether made by our representatives or not, if they regulate and constrain our conduct and affect our private rights in matters of mere indifference, without any good end in view, are regulations destructive of liberty and savor of oppression.

2. Liberty and governmental restraint.—The due exercise of the powers of government, even if thereby a man be deprived of life, liberty or property, is by no means subversive, but rather introductive of liberty; for, as Mr. Locke has well observed, where there is no law there is no freedom. If any general purpose of common utility or public advantage can arise from the control of private rights, this will conduce to preserve the general freedom by supporting that state of society which alone can secure civilized life, and upon which depends the universal good of the nation. But, on the other hand, that constitution of government and that system of control is alone calculated to maintain civil liberty which respects private rights and leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

[Civil liberty, then, consists in the sum of a man's private rights, as they are declared, established and protected against governmental oppression. Political liberty, on the other hand, though used by Blackstone as synonymous with this, consists more properly in the privilege of participation by the people in the election of officers, the making of laws and the direction of government.]

[Although in the centuries of struggle against royal prerogative, strict limits have been set to the executive power, yet the English constitution vests an absolute power of regulating the personal and property rights of the subject in parliament, and there is no constitutional limitation which the citizen can invoke to review its action in any court. In the United States, the courts will inquire whether any act of the legislature, state or national, is valid and constitutional.]

3. Historic declarations and charters of liberty.—The fundamental articles of English liberty have been from time to time asserted and declared in written form in the convulsions consequent on the great struggles of the nation with overbearing and tyrannical princes. First, by the great charter of liberties, which

was obtained, sword in hand, from King John, and afterwards with some alterations, confirmed in parliament by King Henry the Third, his son. Which charter contained very few new grants; but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards, by the statute called *confirmatio cartarum* (a confirmation of the charters), whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that, by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two) from the first Edward to Henry the Fourth. Then after a long interval by the petition of right; which was a parliamentary declaration of the liberties of the people, assented to by King Charles the First in the beginning of his reign. This was closely followed by the still more ample concessions made by that unhappy prince to his parliament before the fatal rupture between them; and by the many salutary laws, particularly the habeas corpus act, passed under Charles the Second. To these succeeded the bill of rights, or declaration delivered by the Lords and Commons to the prince and princess of Orange, 13th of February, 1688; and afterwards enacted in Parliament, when they became king and queen; which declaration concludes in these remarkable words: "and they do claim, demand, and insist upon, all and singular the premises, as their undoubted rights and liberties." And the act of parliament itself recognizes "all and singular the rights and liberties asserted and claimed in the said declaration to be the true, ancient and indubitable rights of the people of this kingdom." Lastly, these liberties were again asserted at the commencement of the eighteenth century, in the act of settlement, whereby the crown was limited to his present majesty's illustrious house: and some new provisions were added, at the same fortunate era, for better securing our religion, laws and liberties; which the statute declares to be "the birthright of the people of England," according to the ancient doctrine of the common law.

Classes of civil rights. Thus much for the declaration of our rights and liberties. The rights themselves, thus defined by those several statutes, consist in a number of private immunities; which will appear from what has been premised, to be indeed no other than either that residuum (the remainder) of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; in other words those private rights and privileges which are "absolute" in the sense of being beyond governmental invasion. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty and the right of private property, because, as there is no other known method of compulsion or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

4. Personal security and punishment for crimes.—The right of personal security consists in the protection afforded to a person's enjoyment of his life, his limbs, his body, his health, and his reputation. This natural life being the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority. Yet nevertheless it may be forfeited for the breach of those laws which are enforced by the sanction of capital punishments. I shall only observe, that whenever the constitution of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives of members of the subject, such constitution is in the highest degree tyrannical; and that, whenever any laws direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may, by prudent caution, provide against it.

Cruel punishments and death penalty. The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity; and the constitution is an utter stranger to any arbitrary power of killing and maiming the

subject without the express warrant of law. *"Nullus liber homo,"* says the great charter, *"aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terrae"* (No freeman shall be deprived of life but by the lawful judgment of his peers or by the law of the land.) Which words, *"aliquo modo destruatur"* according to Sir Edward Coke, include a prohibition, not only of killing and maiming, but also of torturing (to which our laws are strangers), and of every oppression by color of an illegal authority.

Civil death. These rights of life and member, can only be determined by the death of the person; which was formerly accounted to be either a civil or natural death. The civil death commenced, if any man was banished or abjured the realm by the process of the common law, or entered into religion; that is, went into a monastery, and became there a monk professed; in which cases he was absolutely dead in law, and his next heir should have his estate.

5. Personal liberty.—Next to personal security, the law of England regards, asserts, and preserves, the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, [and also freedom of speech, of the press, of contracting and doing business, without imprisonment or restraint, unless by due course of law.] Concerning which we may make the same observations as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that, in this kingdom, it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I, it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By law 16 Car. 1, c. 10, (abolishing the Court of the Star Chamber), if any person be restrained of his lib-

erty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council, he shall, upon demand of his counsel, have a writ of habeas corpus, to bring his body before the court of king's bench or common pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II, c. 2, commonly called the habeas corpus act, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. and M. st. 2, c. 2, that excessive bail ought not to be required.

6. The great writ of habeas corpus.—The great and efficacious remedy, in all manner of illegal confinement, is that of habeas corpus, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum,* to do, to submit to, and receive whatsoever the judge or court awarding such a writ shall consider in that behalf.

Courts always open for this remedy. This writ issues not only in term-time, but also during the vacation by a fiat, from any of the judges running into all parts of the king's dominions; for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted. A remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention of government. For it frequently happens in foreign countries (and has happened in England during temporary suspensions of the statute), that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.

Dangers of arbitrary arrest. Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to

imprison arbitrarily whomever he or his officers thought proper, there should soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life and property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown and forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.

7. **Suspension of remedy by habeas corpus.**—And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or the legislative power, that, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reasons for so doing; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate (let the consuls take care that the commonwealth receive no injury), was called the *senatus consultum ultimae necessitatis*. In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it forever.

8. **Cause to be assigned in order of commitment.**—To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible: personal liberty like personal security is subject to be forfeited as a punishment for the commission of some great and atrocious offence; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment

of the subject may be lawful. This it is, which induces the absolute necessity of expressing upon every commitment the reason for which it is made: that the court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

State prisoners denied release. And yet early in the reign of Charles I, the court of king's bench, relying on some arbitrary precedents (and those perhaps misunderstood), determined that they could not upon an habeas corpus either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by special command of the king, or by the lords of the privy council.

Petition of right. This drew on a parliamentary inquiry, and produced the petition of right, 3 Car. I, which recited this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained.

Judges subservient to king and government. But when in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they however annexed a condition of finding sureties for the good behavior, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time declaring, that "if they were again remanded for that cause, perhaps the court would not afterwards grant an habeas corpus, being already made acquainted with the cause of imprisonment." But this was heard with indignation and astonishment by every lawyer present; according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four-and-twenty years. But whoever will attentively consider English history, may observe, that the flagrant abuse of any power, by the crown or its ministers, has always been productive of a struggle; which either discovers the exercise of that power to be contrary to law, or (if legal) restrains it for the future. This was the case in the present instance.

9. The habeas corpus act.—The oppression of an obscure individual gave birth to the famous habeas corpus act, 31 Car. II, c. 2, which is frequently considered as another magna carta of the kingdom; and by consequence and analogy has also in subsequent times reduced the general method of proceeding on these writs (though not within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty.

The statute itself enacts: (1) That on complaint and request in writing by or on behalf of any person committed and charged with any crime (unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any petit-treason or felony: or any suspicion of such petit-treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process), the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a habeas corpus for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature.

(2) That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them.

(3) That the writ shall be returned and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days.

(4) That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority (specified in the act), shall for the first offence forfeit £100, and for the second offence £200, to the party grieved and be disabled to hold his office.

(5) That no person once delivered by habeas corpus, shall be recommitted for the same offence, on penalty of £500.

(6) That every person committed for treason or felony shall, if he requires it the first week of the next term, or the

first day of the next session of oyer and terminer, be indicted in that term or session, or else admitted to bail: unless the king's witnesses cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term, or session, he shall be discharged from his imprisonment for such imputed offence: but that no person, after the assizes shall be open for the county in which he is detained, shall be removed by habeas corpus, till after the assizes are ended; but shall be left to the justice of the judges of assize.

(7) That any such prisoner may move for and obtain his habeas corpus, as well out of the chancery or exchequer, as out of the king's bench or common pleas; and the lord chancellor or judges denying the same, on sight of the warrant, or oath that the same is refused, forfeit severally to the party grieved the sum of £500.

Such is the substance of that great and important statute which perfects the remedy for liberating the subject from illegal confinement in a public prison on a criminal charge, and the spirit of which has been extended by the judges to all cases.

10. Exile or banishment.—A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king, indeed, by his royal prerogative, may issue out his writ *ne exeat regnum* (let him not leave the kingdom), and prohibit any of his subjects from going into foreign parts without license. This may be necessary for the public service and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England out of the land against his will; no, not even a criminal. For exile and transportation are punishments at present unknown to the common law; and, whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter delares, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the habeas corpus act, 31 Car. II, c. 2 (that second magna carta, and stable bulwark of our liberties), it is enacted, that no subject of this realm, who is an inhabitant of England,

Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas (where they cannot have the full benefit and protection of the common law); but that all such imprisonments shall be illegal; that the person who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire* and be incapable of receiving the king's pardon: and the party suffering shall also have his private action against the person committing, and all his aiders, advisers and abettors; and shall recover treble costs; besides his damages, which no jury shall assess at less than five hundred pounds.

The law in this respect is so benignly and liberally construed for the benefit of the subject, that, though within the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man out of the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might, in reality, be no more than an honorable exile.

11. **Liberty of the press.**—In instances where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less, degree of severity; the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious

tendency, is necessary for the preservation of peace and good order, of government, and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment.

Neither is any restraint hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument heretofore used for the restraining the just freedom of the press, "that it was necessary to prevent the daily abuse of it," will entirely lose its force, when it is shown (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable punishment: whereas it never can be used to any good one, when under the control of an inspector. So true it will be found, that to censure the licentiousness, is to maintain the liberty, of the press.

12. Private property.—The third absolute right, protected against the government, is that of property: which consists in the free use, enjoyment and disposal of all a man's acquisitions, without any control or diminution, save only by the due exercise of the powers of government. The common law is extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes it is enacted that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he can be duly brought to answer, and be forejudged by course of law; and if anything be done to the contrary it shall be redressed and holden for none effect.

13. Power of eminent domain.—So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to

be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men to do this without the consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of the common good, and to decide whether it be expedient or no. Besides the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification for the injury thereby sustained. The public is now considered as an individual treating with an individual for an exchange. All that the legislature does in the exercise of their power, by itself [or through the agency of a public service corporation], is to oblige the owner to alienate his possessions for a reasonable price.

14. Taxation and representation.—Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right, 3 Car. I, that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 W. and M. st. 2, c. 2, it is declared, that levying money for or to the use of the crown, by pretence or prerogative, without grant of parliament, or for longer time, or in other manner, than the same is or shall be granted; is illegal.

15. Other qualifications of private property forfeitures.—[Private property is not only subject to be sold for taxes, and to be regulated for the public welfare under the police power,

but it may be taken in war for the defence of the country, or it may be destroyed to abate a nuisance or stop the spread of a fire, or it may be forfeited for offences.] The true reason and only substantial ground of any forfeiture for crimes consist in this: that all property is derived from society, being one of those civil privileges or rights which are conferred upon individuals, in exchange for that degree of natural freedom which every man must sacrifice when he enters into social communities. If therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him. Hence, in every offence of an atrocious kind, the laws of England formerly exacted a total confiscation of the movables or personal estate; and in many cases a perpetual, in others only a temporary, loss of the offender's immovables or landed property; and vested them both in the king, who is the person supposed to be offended, being the one visible magistrate in whom the majesty of the public resides.

Goods, and chattels, were totally forfeited by conviction of high treason or misprision of treason: of petit treason; of felony in general, and particularly of felony de se, and of manslaughter; nay, even by conviction of excusable homicide; by outlawry for treason or felony, by conviction of petit larceny; by flight, in treason or felony; even though the party be acquitted of the fact; by standing mute, when arraigned of felony; by drawing a weapon on a judge, or striking any one in the presence of the king's courts; by præmunire; by pretended prophecies, upon a second conviction; by owling; by the residing abroad of artificers; and by challenging to fight on account of money won at gaming. All these offences, induced a total forfeiture of goods and chattels.

And this forfeiture commences from the time of conviction, not the time of committing the fact, as in forfeiture of real property. For chattels are of so vague and fluctuating a nature, that to effect them by any relation back, would be attended with more inconvenience than in the case of the landed estates; and part, if not the whole of them, must be expended in maintaining the delinquent, between the time of committing

the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz. c. 5.

16. Auxiliary rights securing liberty.—In the preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman.[1] But in vain would these rights be declared, ascertained and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property. These are,

(1) *The constitution,* powers, and privileges of parliament; of which I shall treat at large in the ensuing chapter.

(2) *The limitation of the king's prerogative,* by bounds so certain and notorious, that it is impossible he should either mistake or legally exceed them without the consent of the people. Of this, also, I shall treat in its proper place. The former of these keeps the legislative power in due health and vigor, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon the executive power by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.

(3) *Right of redress in courts.* A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of magna carta spoken in the person of the king, who in judgment of law (says Sir Edward Coke) is ever present and repeating them in all his courts, are these: *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam* (to none will we sell, to none deny, to none delay either right or justice): "and therefore every subject," continues the same learned author, "for injury done to him *in bonis, in terris, vel persona* (either in his goods,

[1] [See Stimson, Federal and State Constitutions, as to recognition of these civil rights under American constitutions.]

lands, or person), by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay."

Procedure an essential part of due process. Not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament; for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice; but then they must proceed according to the old established forms of the common law. For which reason it is declared, in the statute 16 Car. I, c. 10, upon the dissolution of the court of starchamber, that neither his majesty, nor his privy council, have any jurisdiction, power, or authority, by English bill, petition, articles, libel, (which were the course of proceeding in the starchamber, borrowed from the civil law,) or by any other arbitrary way whatsoever, to examine, or draw into question, determine or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by course of law.

17. Trial by jury a bulwark of liberty.—Trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases! It is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. A constitution, that I may venture to affirm has, under Providence, secured the just liberties of this nation for a long succession of ages. And therefore a celebrated French writer, who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must also perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.

Great as this eulogium may seem, it is no more than this

admirable constitution, when traced to its principles, will be found in sober reason to deserve. The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that the few should be always attentive to the interests and good of the many. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts.

It is wisely therefore ordered, that the principles and axioms of law, which are general propositions, flowing from abstracted reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of fact pre-established. But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen; chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.

Other tribunals contrasted. Every new tribunal, erected for the decision of facts, without the intervention of a jury (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates), is a step towards establishing aristocracy, the most oppressive of absolute governments. The feudal system, which, for the sake of military subordination, pursued an aristocratical plan in all its arrangements of property, had been intolerable in times of peace, had it not been wisely counterpoised by that privilege so universally diffused through every part of it, the trial by the feudal peers.

Yet, after all, it must be owned, that the best and most effectual method to preserve and extend the trial by jury in practice, would be by endeavoring to remove all the defects, as well as to improve the advantages incident to this mode of inquiry. If justice is not done to the entire satisfaction of the people, in this method of deciding facts, in spite of all encomiums and panegyrics on trials at the common law, they will resort in search of that justice to another tribunal.

18. **Right to petition.**—If there should happen any uncommon injury, or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances. In Russia we are told that the Czar Peter established a law, that no subject might petition the throne till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong: the consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and, while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult, as happened in the opening of the memorable parliament in 1640: and, to prevent this, it is provided by the statute 13 Car. II, st. 1, c. 5, that no petition to the

king, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury in the country; and in London by the lord mayor, aldermen, and common council; nor shall any petition be presented by more than ten persons at a time. But, under these regulations, it is declared by the statute 1 W. and M. st. 2, c. 2, that the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal.

19. Right to bear arms.—The fifth auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute, 1 W. and M. st. 2, c. 2, and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

20. Supremacy of law.—The English law ascribes to the king the attribute of sovereignty. Hence it is, that no suit or action can be brought against the king even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it; but who, says Finch, shall command the king? Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more; and, if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

Are then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries or public oppression? To this we may answer, that the law has provided a remedy in both cases.

And, first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace though not upon compulsion. And, as to personal wrongs, it is well observed by Mr. Locke, "The harm which the sovereign can do in his own person not being likely to happen often, nor to extend itself far; nor being able by his single strength to subvert the laws, nor oppress the body of the people (should any prince have so much weakness and ill-nature as to endeavor to do it)—the inconveniency therefore of some particular mischiefs, that may happen sometimes, when a heady prince comes to the throne, are well recompensed by the peace of the public and security of the government, in the person of the chief magistrate, being thus set out of the reach of danger."

Responsibility of his advisers. Next, as to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. For as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the king himself can do no wrong: since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.

Abuses of power may be without legal remedy. For, as to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, they are cases, which the law will not, out of decency, suppose: being incapable of distrusting those whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable. The supposition of law, therefore is, that neither the king nor either house of parliament, collectively taken, is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any adequate remedy. For which reason all oppressions which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule or express

legal provision; but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

21. Right of revolution not a legal right.—In England parliament has absolute, sovereign and uncontrollable authority. It must be owned that Mr. Locke, and other theoretical writers, have held, that "there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them; for, when such trust is abused, it is thereby forfeited, and devolves to those who gave it." But however just this conclusion may be in theory, we cannot practically adopt it, nor take any legal steps for carrying it into execution, under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by that people; reduces all the members to their original state of equality; and, by annihilating the sovereign power, repeals all positive laws whatsoever before enacted.[1] No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual. So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control. But whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to.

[1] [The Declaration of Independence changed the form of government without destroying or repealing the laws. Revolution is an extra-judicial and extra-legal remedy by self-help, which is treason against the old government, but is recognized as patriotism and heroism under the new government which is established thereby.]

CHAPTER XLVII.

POLITICAL ORGANIZATION AND DEPARTMENTS OF GOVERNMENT.

1. **Self government by representation.**—In a free state every man, who is supposed a free agent, ought to be in some measure his own governor; and therefore a branch at least of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small and its citizens easily known, should be exercised by the people in their aggregate or collective capacity, as was wisely ordained in the petty republics of Greece, and the first rudiments of the Roman state. But this will be highly inconvenient, when the public territory is extended to any considerable degree, and the number of citizens is increased. Thus when, after the social war, all the burghers of Italy were admitted free citizens of Rome, and each had a vote in the public assemblies, it became impossible to distinguish the spurious from the real voter, and from that time all elections and popular deliberations grew tumultuous and disorderly; which paved the way for Marius and Sylla, Pompey and Cæsar, to trample on the liberties of their country, and at last to dissolve the commonwealth. In so large a state as ours, it is therefore very wisely contrived that the people should do that by their representatives, which it is impracticable to perform in person; representatives, chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished.

2. **Members of parliament represent what.**—The counties are therefore represented by knights, elected by the proprietors of lands; the citizens and boroughs are represented by citizens and burgesses, chosen by the mercantile part, or supposed trading interests of the nation; much in the same manner as the burghers in the diet of Sweden are chosen by the corporate towns, Stockholm sending four, as London does with us, other cities two, and some only one. And every member, though

chosen by one particular district, when elected and returned, serves for the whole realm; for the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the commonwealth; to advise his majesty (as appears from the writ of summons) "*de communi concilio super negotiis quibusdam arduis et urgentibus, regem, statum, et defensionem regni Angliæ et ecclesiæ Anglicanæ concernentibus*" (concerning the common council upon certain difficult and urgent affairs relating to the king, the state, and defence of the kingdom of England and of the English church). And therefore he is not bound, like a deputy in the united provinces, to consult with, or take the advice of, his constituents upon any particular point, unless he himself thinks it proper or prudent so to do.

3. The right of suffrage and property qualifications.—Next, with regard to the elections of knights, citizens and burgesses, we may observe, that herein consists the exercise of the democratical part of our constitution: for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In all democracies therefore it is of the utmost importance to regulate by whom, and in what manner, the suffrages are to be given. And the Athenians were so justly jealous of this prerogative, that a stranger, who interfered in the assemblies of the people, was punished by their laws with death: because such a man was esteemed guilty of high treason, by usurping those rights of sovereignty, to which he had no title. In England, where the people do not debate in a collective body but by representation, the exercise of this sovereignty consists in the choice of representatives. The laws have therefore very strictly guarded against usurpation or abuse of this power, by many salutary provisions; which may be reduced to these three points, (1) the qualifications of the electors. (2) The qualifications of the elected. (3) The proceedings at elections.

As to the qualifications of the electors. The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent

with general liberty. If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But, since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications; whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other. The knights of shires are the representatives of the landholders, or landed interest of the kingdom: their electors must therefore have estates in lands or tenements, within the county represented: these estates must be freehold, that is, for term of life at least; because beneficial leases for long terms of years were not in use at the making of these statutes, and copyholders were then little better than villeins, absolutely dependent upon their lords; this freehold must be of forty shillings annual value; because that sum would then, with proper industry, furnish all the necessaries of life, and render the freeholder, if he pleased, an independent man.

4. The constituents of parliament.—The constituent parts of a parliament are the next objects of our inquiry. And these are the king's majesty, sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal (who sit, together with the king, in one house) and the commons, who sit by themselves in another. And the king, and these three estates, together, form the great corporation or body politic of the kingdom, of which the king is said to be *caput, principium, et finis* (the head, beginning, and end). For upon their coming together the king meets them either in person or by representation; without which there can be no beginning of a parliament; and he also has alone the power of dissolving them.

5. Taxation bills must originate in house of commons.—With regard to taxes; it is the ancient indisputable privilege and right of the house of commons [from which all its other powers have been largely derived] that all grants of subsidies

or parliamentary aids do begin in their house, and are first bestowed by them; although their grants are not effectual to all intents and purposes, until they have the assent of the other two branches of the legislature. The general reason, given for this exclusive privilege of the house of commons, is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be unanswerable, if the commons taxed none but themselves; but it is notorious that a very large share of property is in the possession of the house of lords; that this property is equally taxable, and taxed, as the property of the commons; and therefore the commons, not being the sole persons taxed, this cannot be the reason of their having the sole right of raising and modelling the supply.

The true reason, arising from the spirit of our constitution, seems to be this. The lords, being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the crown, and when once influenced to continue so, than the commons, who are a temporary, elective body, freely nominated by the people. It would therefore be extremely dangerous, to give the lords any power of framing new taxes for the subject; it is sufficient that they have a power of rejecting, if they think the commons too lavish or improvident in their grants. But so reasonably jealous are the commons of this valuable privilege, that therein they will not suffer the other house to exert any power but that of rejecting; they will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill; under which appellation are included all bills, by which money is directed to be raised upon the subject, for any purpose or in any shape whatsoever; either for the exigencies of government, and collected from the kingdom in general, as the land tax; or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like.

6. **Supreme legislative power of parliament.**—The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, "*si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est*

capacissima" (if you consider its antiquity, it is most ancient; if its dignity, it is most honorable; if its jurisdiction, it is most extensive). It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all the possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms.

All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown; as was done in the reign of Henry VIII and William III. It can alter the established religion of the land; as was done in a variety of instances, in the reigns of King Henry VIII and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament.[1] True it is, that what the parliament doth, no authority upon earth can undo; so that it is a matter most essential to the liberties of this kingdom that such members be delegated to this important trust as are most eminent for their probity, their fortitude, and their knowledge.

7. **Irrepealable legislation.**—Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII, c. 1, which directs that no person for assisting a king de facto (in fact) shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecution for high treason; but will not restrain or clog any parliamentary attainder. Because the legislature, being in truth the sovereign power, is always of equal, always of abso-

[1][In the United States the legislatures of the States and the Nation are vested only with limited powers, and are restrained by constitutions and courts, to an extent which is calling forth vigorous protests from those who believe that the constitutional restraints have become the bulwark of special privilege rather than of human liberty.]

lute authority; it acknowledges no superior upon earth which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavor to tie up the hands of succeeding legislatures. "When you repeal the law itself (says he), you at the same time repeal the prohibitory clause, which guards against such repeal."

8. **Impossible and unreasonable acts.**—Lastly, acts of parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. [Very nearly this degree of power is claimed and exercised by American courts under the "due process" clause.]

But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* (as to this) disregard it. Thus if an act of parliament gives a man power to try all causes that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

9. The veto power.—The king is himself a part of the parliament: and, as this is the reason of his being so, very properly, therefore the share of legislation, which the constitution has placed in the crown, consists in the power of rejecting rather than resolving; this being sufficient to answer the end proposed. For we may apply to the royal negative in this instance, what Cicero observes of the negative of the Roman tribunals, that the crown has not any power of doing wrong, but merely of preventing wrong from being done. The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses. The legislative therefore cannot abridge the executive power of any rights which it now has by law, without its own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it.[1]

Checks and balances. And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching and punishing the conduct (not indeed of the king, which would destroy his constitutional independence; but, which is more beneficial to the public) of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates, and is regulated by the rest: for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from

[1] [Parliament has assumed to itself the exercise of the executive power and the reins of administration through the ministry or cabinet, which is elected by and must keep the confidence of the House of Commons. Thus practically all the royal prerogatives which formerly belonged to the king in his own right have been transferred to the representatives of the people, though still nominally exercised in the king's name. If the Commons insist on a measure the House of Lords must yield.]

separation and artificially connected together by the mixed nature of the crown, which is a part of the legislature, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community.

10. Executive powers of external sovereignty.—The prerogatives of the crown (in the sense under which we are now considering them) respect either this nation's intercourse with foreign nations, or its own domestic government and civil polity. With regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community. In the nation's intercourse with foreign nations he is considered as the delegate or representative of his people. [This is true only in dealing with foreign nations, not a domestic sovereign.]

Ambassadors. The king therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home.

Treaties. It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power; and then it is binding upon the whole community: and in England the sovereign power, quoad hoc (as to this), is vested in the person of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution (as we hinted before) hath here interposed a check, by the means of a parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honor and interest of the nation.

War power. Upon the same principle the king has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right

of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power: and this right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war. Whatever hostilities therefore may be committed by private citizens, the state ought not to be affected thereby; unless that should justify their proceedings, and thereby become partner in the guilt. Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers: according to that rule of the civil law; *hostes hi sunt qui nobis, aut quibus nos, publice bellum decrevimus: cæteri latrones aut prædones sunt* (those are enemies who have publicly declared war against us, or against whom we have publicly declared war; all others are thieves or robbers).

And the reason which is given by Grotius, why, according to the laws of nations, a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard (which is matter rather of magnanimity than right), but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that, in order to make a war completely effectual, it is necessary with us in England that it be publicly declared and duly proclaimed by the king's authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it. And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative.

11. **Executive powers of internal sovereignty.**—[In domestic affairs the king is not considered as the delegate or repre-

sentative of the people as in the nation's intercourse with foreign nations.]

(1.) *The king affected by what statutes.* First, he is a constituent part of the supreme legislative power; and, as such, has the prerogative of rejecting such provisions in parliament as he judges improper to be passed. The expediency of which constitution has before been evinced at large. I shall only farther remark, that the king is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised ("any person or persons, bodies politic or corporate, &c.") affect not him in the least, if they may tend to restrain or diminish any of his rights or interests.

For it would be of most mischievous consequence to the public if the strength of the executive power were liable to be curtailed without its own express consent, by constructions and implications of the subject. Yet, where an act of parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the king as upon the subject: and, likewise, the king may take the benefit of any particular act, though he be not especially named. [There are somewhat similar rules of construction as to when statutes apply to a state.]

(2.) *Prosecutor of crime.* In criminal proceedings, or prosecutions for offences, it would be a still higher absurdity if the king personally sate in judgment; because, in regard to these, he appears in another capacity, that of prosecutor. All offences are either against the king's peace, or his crown and dignity; and are so laid in every indictment. For though in their consequences they generally seem (except in the case of treason, and a very few others), to be rather offences against the kingdom than the king, yet as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate; all affronts to that power, and breaches of those rights are immediately offences against him to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law.

(3.) *Commander in chief of military.* The king is considered, in the next place, as the generalissimo, or the first in military command, within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community; and the principal use of government is to direct that united strength in the best and most effectual manner to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose: it follows, therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince. In this capacity, therefore, of general of the kingdom, the king has the sole power of raising and regulating fleets and armies.[1]

12. Military organization under the feudal system.—Upon the Norman conquest the feudal law was introduced here in all its rigor, the whole of which is built on a military plan. I shall not now enter into the particulars of that constitution, but shall only observe, that, in consequence thereof, all the lands in the kingdom were divided into what were called knight's fees, in number above sixty thousand; and for every knight's fee a knight or soldier, *miles,* was bound to attend the king in his wars, for forty days in a year; in which space of time, before war was reduced to a science, the campaign was generally finished, and a kingdom either conquered or victorious. By this means the king had, without any expense, an army of sixty thousand men always ready at his command. And accordingly we find one, among the laws of William the Conqueror, which in the king's name commands and firmly enjoins the personal attendance of all knights and others "that they keep and hold themselves always well furnished with arms and horses, as is suitable and proper: and be always well prepared for fulfilling and performing their entire service to us when need shall be; according to what they are by law bound to do for us by reason of their fees and tenements." This personal service in process of time degenerated into pecuniary commutations or aids, and at last the military part of the feudal system was abolished at the Restoration, by statute 12 Car. II, c. 24.

[1] [The President of the United States is commander in chief of the regular army and navy, and of the militia of the states, when called into the service of the United States.]

13. Military law and discipline.—To keep order and discipline in the army, an annual act of parliament likewise passes, "to punish mutiny and desertion, and for the better payment of the army and their quarters." This regulates the manner in which they are to be dispersed among the several innkeepers and victuallers throughout the kingdom; and establishes a law martial for their government. By this, among other things, it is enacted, that if any officer or soldier shall excite, or join any mutiny, or, knowing of it, shall not give notice to the commanding officer; or shall desert, or list in any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel or enemy, or strike or use violence to his superior officer, or shall disobey his lawful commands: such offender shall suffer such punishment as a court martial shall inflict, though it extend to death itself.

However expedient the most strict regulations may be in time of actual war, yet in times of profound peace a little relaxation of military rigor would not, one should hope, be productive of much inconvenience. And upon this principle, by our standing laws (still remaining in force, though not attended to), desertion in time of war is made felony, without benefit of clergy, and punished the more mildly in time of tranquillity. But our mutiny act makes no such distinction: for any of the faults above mentioned are, equally at all times, punishable with death itself, if a court martial shall think proper. This discretionary power of the court martial is indeed to be guided by the directions of the crown; which, with regard to military offences, has almost an absolute legislative power. "His majesity," says the act, "may form articles of war, and constitute courts martial, with power to try any crime by such articles, and inflict penalties by sentence or judgment of the same."

Military subjection. A vast and most important trust! an unlimited power to create crimes, and annex to them any punishments, not extending to life or limb! These are indeed forbidden to be inflicted, except for crimes declared to be so punishable by this act; which crimes we have just enumerated, and among which we may observe that any disobedience to lawful commands is one. Perhaps in some future revision of this act, which is in many respects hastily penned, it may be thought worthy the wisdom of parliament to

ascertain the limits of military subjection, and to enact express articles of war for the government of the army, as is done for the government of the navy: especially as by our present constitution, the nobility and gentry of the kingdom, who serve their country as militia officers, are annually subjected to the same arbitrary rule during their time of exercise. [This has been done.]

One of the greatest advantages of our English law is, that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious; nothing is left to arbitrary discretion: the king by his judges dispenses what the law has previously ordained; but is not himself the legislator. How much therefore is it to be regretted that a set of men, whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of freemen! For Sir Edward Coke will inform us, that it is one of the genuine marks of servitude, to have the law, which is our rule of action, either concealed or precarious: "*misera est servitus ubi jus est vagum aut incognitum.*" Nor is this state of servitude quite consistent with the maxims of sound policy observed by other free nations.

Discipline in the navy. The method of ordering seamen in the royal fleet, and keeping up a regular discipline there, is directed by certain express rules, articles, and orders, first enacted by the authority of parliament soon after the restoration; but since new-modelled and altered, after the peace of Aix-la-Chapelle to remedy some defects which were of fatal consequence in conducting the preceding war. In these articles of the navy almost every possible offence is set down, and the punishment thereof annexed: in which respect the seamen have much the advantage over their brethren in the land service, whose articles of war are not enacted by parliament, but framed from time to time at the pleasure of the crown. Yet from whence this distinction arose, and why the executive power, which is limited so properly with regard to the navy, should be so extensive with regard to the army, it is hard to assign a reason: unless it proceeded from the perpetual establishment of the navy, which rendered a permanent law for their regulation expedient; and the temporary duration of the army, which subsisted only from year to year, and might therefore with less dan-

ger be subjected to discretionary government. But, whatever was apprehended at the first formation of the mutiny act, the regular renewal of our standing force at the entrance of every year has made this distinction idle. For, if from experience past we may judge of future events, the army is now lastingly ingrafted into the British constitution, with this singularly fortunate circumstance, that any branch of the legislature may annually put an end to its legal existence, by refusing to concur in its continuance.

14. Executive proclamations and administrative orders.— These proclamations have then a binding force, when (as Sir Edward Coke observes), they are grounded upon and enforce the laws of the realm. For, though the making of laws is entirely the work of a distinct part, the legislative branch of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary. Thus the established law is, that the king may prohibit any of his subjects from leaving the realm: a proclamation therefore forbidding this in general for three weeks, by laying an embargo upon all shipping in time of war, will be equally binding as an act of parliament, because founded upon a prior law.

But a proclamation to lay an embargo in time of peace upon all vessels laden with wheat (though in a time of a public scarcity) being contrary to law, and particularly to statute 22 Car. II, c. 13, the advisers of such a proclamation, and all persons acting under it, found it necessary to be indemnified by a special act of parliament. 7 Geo. III, c. 7. A proclamation for disarming papists is also binding, being only in execution of what the legislature has first ordained: but a proclamation for allowing arms to papists, or for disarming any protestant subjects will not bind; because the first would be to assume a dispensing power, the latter a legislative one; to the vesting of either of which in any single person the laws of England are absolutely strangers. Indeed by the statute 31 Hen. VIII, c. 8,

it was enacted that the king's proclamations should have the force of acts of parliament; a statute which was calculated to introduce the most despotic tyranny, and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after.

15. **Executive powers absolute.**—The king may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences, he pleases; unless where the constitution hath expressly, or by evident consequence, laid down some exception, or boundary; declaring, that thus far the prerogative shall go, and no farther. For otherwise the power of the crown would indeed be but a name and a shadow, insufficient for the ends of government, if where its jurisdiction is clearly established and allowed, any man or body of men were permitted to disobey it, in the ordinary course of law: I say in the ordinary course of law; for I do not now speak of those extraordinary recourses to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against oppression. And yet the want of attending to this obvious distinction has occasioned these doctrines, of absolute power in the prince and of national resistance by the people, to be much misunderstood and perverted, by the advocates for slavery on the one hand, and the demagogues of faction on the other.

16. **Separation of judicial power from executive.**—Another capacity, in which the king is considered in domestic affairs, is as the fountain of justice and general conservator of the peace of the kingdom. By the fountain of justice, the law does not mean the author or original, but only the distributor. Justice is not derived from the king, as from his free gift; but he is the steward of the public, to dispense it to whom it is due. He is not the spring, but the reservoir, from whence right and equity are conducted, by a thousand channels, to every individual. The original power of judicature, by the fundamental principles of society, is lodged in the society at large: but as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints;

and in England this authority has immemorially been exercised by the king or his substitutes.

The source of jurisdiction. He therefore has alone the right of erecting courts of judicature; for, though the constitution of the kingdom hath intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary that courts should be erected, to assist him in executing this power; and equally necessary that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.

It is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depositories of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter but by act of parliament.

Dependence of the courts. And in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 Wm. III, c. 2, that their commissions shall be made (not, as formerly, *durante bene placito,* during pleasure, but) *quamdiu bene se gesserint* (so long as they shall have conducted themselves uprightly), and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And now, by the noble improvements of that law, in the statute of 1 Geo. III, c. 23, enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behavior, notwithstanding any demise of the crown (which was formerly held immediately to vacate their seats), and their full salaries are absolutely secured to them during the continuance of their commissions; his majesty having been pleased to declare, that "he looked upon the independence

and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the crown."

Importance of independent judiciary. In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law, which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative. For which reason, by the statute of 16 Car. I, c. 10, which abolished the court of star chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law which was most agreeable to the prince or his officers. Nothing, therefore, is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state.

17. Conclusion.—We have seen in the course of our inquiries, in this and the former chapters, that the fundamental maxims and rules of the law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wisdom of ages: that the forms of administering justice came to perfection under Edward the First; and have not been much varied, nor always for the better, since: that our religious liberties were fully established at the reformation; but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained till after the restoration of King Charles, nor fully and explicitly acknowledged and defined till the era of the happy revolution.

Of a constitution so wisely contrived, so strongly raised, and

so highly finished, it is hard to speak with that praise which is justly and severely its due: the thorough and attentive contemplation of it will furnish the best panegyric. It hath been the endeavor of these Commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the harmonious concurrence of those several parts, to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of ancient simplicity, and the more curious refinements of modern art. Nor have its faults been concealed from view, for faults it has; lest we should be tempted to think it of more than human structure; defects, chiefly arising from the decays of time, or the rage of unskilful improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom as are delegated by their country to parliament. The protection of the liberty of Britain is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this the best birthright, and noblest inheritance of mankind.

QUIZ QUESTIONS

BLACKSTONE'S COMMENTARIES

REVISED AND ABRIDGED

(The numbers refer to the numbered sections in the text.)

CHAPTER I.

1. Contrast municipal law with international law and the law of nature.
2. (a) Define municipal law. (b) For what three reasons is it stated to be a rule?
3. How is law "prescribed"?
4. What are the four constituent parts or elements of a typical law?
5. Is there a moral obligation to abstain from mala prohibita as contrasted with such things as are mala in se?

CHAPTER II.

1. (a) Is the "unwritten" law merely oral? (b) Why is it so called? (c) Why is it called "common law," and what other kind of municipal law is there?
2. What is the source or foundation of the common law?
3. How are the customs and maxims of the common law to be known?
4. Why are precedents followed?
5. To what extent may reason be regarded as a source of law?
6. (a) Are judicial opinions themselves the law? (b) What is the difference between "records" and "reports"? (c) What English reports are known as Year Books?
7. Name some of the early text writers upon the common law.
8. (a) Give examples of particular or special customs. (b) What are the seven requisites to the legality of a particular custom?

9. How far was English law in force in the American colonies?
10. (a) What is the civil law? (b) In what books was it compiled? (c) In what countries is it the great source or basis of the legal system?

CHAPTER III.

1. What is the general scope of the law of torts?
2. What is the reason for the early division of torts into two great classes?
3. Must the plaintiff still choose between suing in trespass or case?
4. What are the various classes of rights and injuries? Draw a diagram showing them.
5. May a man sue for an assault without proving actual damage?
6. (a) How much violence is necessary to constitute a battery? (b) Give instances of justification for battery.
7. (a) Is an arrest for a few moments by a private citizen a "false imprisonment"? (b) What are the two remedies for false imprisonment?
8. What two torts violate the right of reputation?
9. (a) What three kinds of words are actionable per se? (b) What must plaintiff allege and prove in an action for slander if the words are not actionable per se?
10. Compare libel with slander.
11. What constitutes publication of a libel?
12. Is truth a satisfactory defence to an action for slander or libel?
13. Compare absolute and conditional privilege for untrue criticisms of another.

CHAPTER IV.

1. (a) What three wrongs violate a husband's rights in respect to his wife? (b) Is a battery of the wife which disables her one wrong or two?
2. (a) What two wrongs may be done to parental rights? (b) When does a right of action arise from the seduction of a daughter, and in what does the wrong consist?

3. Has the wife or child any right to sue for disabling or taking away the husband or parent?
4. Are any rights incident to domestic relations violated by the wrongful killing of a member of the family?

CHAPTER V.

1. Injuries to personal property may be how classified, broadly? Make a diagram.
3. Is damage to goods which are not in the owner's possession a trespass as against him?
4. What is the remedy for the wrongful taking of goods?
5. What points are necessary to support an action of detinue?
6. What is the scope of the action of trover and what does plaintiff recover thereby?
7. (a) Mention three different ways of committing a conversion of personal property. (b) Conversion of personal property is analogous to what tort against real property?

CHAPTER VI.

1. Mention four classes of injuries affecting real property.
2. (a) What is ouster? (b) What is seisin? (c) What is disseisin? (d) What is disseisin at election? (e) What is ejection?
3. (a) What is the modern remedy for all species of ouster and dispossession? (b) What is the difference between the remedies open to owner of chattels converted and the disseised owner of land?
4. What varieties of trespass are there?
5. (a) What is trespass "by breaking his close"? (b) How great a "breaking" is necessary? (c) Must plaintiff show actual damage?
6. (a) When does one become a trespasser by remaining on land. (b) Is a tenant holding over a trespasser?
7. What is trespass ab initio?
8. What is trespass by relation?
9. When is physical contact not a trespass?
10. Is it necessarily trespass to cross land in an airship above the surface?

11. When must plaintiff bring separate actions for repeated acts of trespass?
12. When is an entry on another's land lawful, though without express leave of the owner?
13. What is trespass to try title?

CHAPTER VII.

1. (a) What are the varieties of the tort of nuisance. (b) Does it violate any right other than that of real property?
2-3. Give instances of the different sorts of private nuisance to the occupation of land.
4. Give examples of nuisances to incorporeal rights.
5. When is there a private remedy for a public nuisance?
6. What is abatement of nuisance?
7. What are the two remedies by suit?
8. Distinguish trespass and waste.
9. Why cannot a prospective heir complain of waste.
10. What estates are injured by waste?
11. Mention three remedies for waste and what relief is given in each.

CHAPTER VIII.

1. (a) What right is invaded by malicious prosecution? (b) What items of damage may result from this injury?
2. What three propositions must the plaintiff plead and prove to show that no justification existed for defendant's instituting a criminal prosecution?
3. Is the malicious bringing of an unfounded civil action ever recognized as a tort?
4. (a) What right is infringed by the tort of deceit? (b) What sorts of damage may result from deceit? (c) What right may be infringed by fraudulent seduction?
5–9. List the essential elements of deceit.

CHAPTER IX.

1–2. What is the nature of the right which is infringed by malicious interference with business?
3. Give examples of competition that are not justifiable methods of interfering with another's business.

4. Give an example of wrongful disturbing of established business relations.
5. Is it a tort to procure breach of contract of any payment by the master or servant?
6–8. Is intentional interference with business of an employer by strikers ever unjustifiable? If so when does it become illegal?

CHAPTER X.

1. Into what two great branches may the law of torts be divided?
2. What are the general conditions of responsibility for tort?
3. What is the principle underlying the various suggested tests of "proximate" and "remote" cause?
4. Mention certain instances of justification and excuse for the doing of intentional harm to another.
5. Compare civil and criminal responsibility.
6. Is the modern standard of responsibility more or less strict than that of ancient law?
7. Why is mistake of fact no defence in tort, while accident is an excuse?
8. What is the general principle as to the existence of a duty to use care to avoid harm?
9. (a) What is negligence? (b) What is the external standard?
10. Is lunacy, infancy, blindness or other incapacity in general an excuse in tort?
11. What are the duties of an occupier of land to different classes of persons?
12. What is the basis of the defence of contributory negligence?
13. What is the "last clear chance" rule?
14. What is the comparative negligence rule?
15. Mention four situations where a man is placed under absolute liability, irrespective of negligence on his own part.
16. When is one absolutely liable for harm done by a dog or by cattle?
17. What is the rule of Rylands v. Fletcher?
18. What is the basis of the liability of the master for the torts of his servants against third persons?

19. What is the test of the responsibility of the master for the servant?
20. When does responsibility of the employer cease?
21. (a) What limitations are there on an employer's liability to his own servants? (b) Describe "assumption of risk," and the "fellow servant doctrine."
22. What are employer's liability acts?
23. Is one liable for the accidental consequences of criminal or illegal acts?

CHAPTER XI.

1. What are the three great branches of criminal law?
2. (a) State carefully the distinction between torts and crimes. (b) In what sense only are all crimes public wrongs?
3. (a) Is there any element of evil that furnishes a sure test of criminality of wrongs? (b) How do various offences come to be selected, recognized, and defined as crimes? (c) Are all crimes wrongs mala in se, involving depravity, wickedness and moral turpitude? (d) Is the line between what acts are punishable and what not a fixed or shifting one?
4. How are criminal offences now mostly defined?
5. Are the rules of criminal responsibility a matter largely of statute law? Why not?

CHAPTER XII.

1. What is the basis of the distinction between felonies and misdemeanors?
2. (a) Define felony at common law. (b) Enumerate some felonies and some misdemeanors. (c) Is this classification a good test of the degree of the criminality of offenses?
3. (a) What three points distinguish treasons from felonies? (b) Is treason now treated as a class of crimes?
4. (a) What was the punishment of all felonies at common law? (b) What was the effect of such severity?
5. Did Blackstone regard the criminal law as perfect in his day?
6. Is the reform of punishment a legal question?
7. (a) What are some of the punishments which formerly

were fixed as the price of crime? (b) What is the modern tendency in treating criminal offenders?

CHAPTER XIII.

1. Are criminal offences defined by common law or by statute?
2. What elements in general enter into a criminal offence?
3. Make a diagram classifying the various criminal offences.
4. (a) What are the various offences against the person? (b) What three are felonies?
5. Who may be punished for crime when a man commits suicide? What crime?
6. (a) Define murder. (b) What is the presumption at common law as to "malice aforethought" and the degree of homicide? (c) How might the presumption as to malice be rebutted?
7. (a) Does "malice aforethought" require that killing be deliberate, premeditated or intentional to constitute murder? (b) Does "malice" mean hatred or evil motive toward the person killed?
8. (a) What are degrees in murder? (b) Do they exist at common law?
9. (a) What cases of homicide does manslaughter include? (b) What two branches of manslaughter may be distinguished? (c) May provocation be sufficient to justify or excuse a homicide? (d) Explain what kind of provocation will and what will not reduce killing from murder to manslaughter?
10. Give illustrations where accidental killing is excusable, where it amounts to manslaughter and where it may amount to murder; (a) in cases of negligence, (b) as a consequence of tort, crime or unlawful act.

CHAPTER XIV.

1–2. What is robbery, and what right does it violate?
3. (a) Define arson. (b) Is it in its essence merely an offense against property rights? (c) Is it ever arson to burn one's own house? (d) Is burning down an abandoned residence or a barn the crime of arson? (e) Suppose the fire set is

quickly put out, before it has done any harm to the house, is this arson?

4. (a) What four points enter into the definition of burglary? (b) Is housebreaking by day with intent to steal, any crime? (c) In what respect does burglary resemble arson? It is an offense against what? (d) Give examples of what buildings and rooms are protected as habitations, and what not?
5. (a) What constitutes a "breaking?" Give examples. (b) Is unlocking an inner door a technical "breaking" if the intruder enters by an open door or window? (c) Give examples of acts which amount to "entry," without going in.
6. (a) If an intruder breaks and enters a dwelling merely to frighten the occupants, without intent to commit any felony therein, is he a burglar? (b) Suppose the intruder intended to steal, but is frightened away without taking anything at all, is this burglary?
7. (a) Define larceny or theft. (b) What torts does the offense involve against property?
8. What acts do not constitute a "taking?"
9. What will amount to an "asportation," or severance from the owner's possession?
10. Has a trespasser the "animum furandi" if he takes goods temporarily, a horse or automobile, intending to return them? By mistake?
11. (a) If gold nuggets are taken from a placer mine and immediately carried off, would this be larceny? Why not? (b) If fruit is shaken down and the trespasser later returns and carts it off, is this larceny? (c) Defendant, on Monday, cut grass belonging to X, and left it lying in X's field; on Wednesday he returned and raked it into cocks; on Friday he took it away. Is defendant guilty of any crime? (d) Is it larceny at common law to steal a valuable dog? To steal a bond or note?
12. What has been the effect of capital punishment of larceny at common law?
13. Describe two kinds of compound larceny.
14. (a) What is the origin of the offense termed embezzlement? (b) How does it differ from larceny?
15. (a) To what tort may obtaining property by false pre-

tences be compared? Why? (b) Compare it with larceny.
16. Compare extortion to false pretenses and robbery.
17. (a) When is the crime of forgery consummated? (b) Is it necessary that someone be defrauded?
18. Define forcible entry and detainer.
19. What crimes are also violations of rights in real property?

CHAPTER XV.

1. What are the various classes of public offenses?
2. Why is treason carefully defined and limited by constitution and statute?
3. What is the conception of treason in American law as contrasted with that of English law?
4. (a) What are the two branches of treason? (b) "Adhering to the enemies" means what? (c) "Levying War" consists in what? (d) When do traitors become heroes?
5. Are rebels and traitors ever patriots?
6. What is the public peace?
7. How do riots differ from unlawful assemblies and routs and insurrections or rebellions?
8. What is the effect of "reading the riot act?"
9. Who may suppress an affray? How?
10. Compare criminal libel with the tort of libel.
11. Compare a public nuisance with a private nuisance.
12. What are police regulations?
13. (a) May a man be convicted of attempt to steal, if he tries to pick an empty pocket? (b) What is criminal conspiracy? (c) What is incitement?
14. (a) When does a country punish crimes committeed outside its own borders? (b) Compare piracy with robbery.

XVI.

1. What are the two elements of a complete crime?
2. (a) What is the difference between specific intent and general intent or mens rea? (b) Give examples of specific intent.
3. (a) May "criminal intent" exist in cases of accidental kill-

ing? (b) With what principle of responsibility does the law start?

4. Was either accident or self-defense a perfect justification at common law for killing another?

5–6. In what four cases is the killing of another person justifiable?

7. When is accident an excuse?

8. (a) If a man murderously attacked has any other possible way of escape, as by running away, may he shoot his assailant in self-defense? (b) May the original assailant ever avail himself of the plea of self-defense, if he is about to be killed in a fight?

9. (a) Is necessity ever an excuse for killing one who is innocent, as in case of two drowning persons struggling for the same plank? (b) Is necessity ever an excuse for stealing food?

10. In what cases is compulsion command, or constraint recognized as an excuse for committing a criminal offense?

11. Give various instances where mistake is and where it is not an excuse removing mens rea.

12. (a) Into what three classes are infants divided with reference to capacity for criminal intent? (b) May the presumption of incapacity of an infant between the ages of 7 and 14 be rebutted?

13. (a) Can an insane person be guilty of crime? (b) What constitutes insanity sufficient to overthrow the presumption of criminal intent?

14. Is voluntary drunkenness an excuse for killing another? For theft?

15. What is former jeopardy?

16. What is benefit of clergy and what purpose did it serve?

CHAPTER XVII.

1. (a) What is the difference between a principal in the first and second degree? (b) Between a principal in the second degree and an accessory? (c) When may one be a principal in the first degree, though absent when the actual killing takes place?

2. Why is no distinction made between principal and accessory

in treason and misdemeanors, and why is one made in felonies?

3. Give examples when a man becomes accessory before the fact to murder.
4. Is a wife who assists and conceals her husband, guilty of felony, or accessory after the fact?
5. Can accessories now be tried before the conviction of the principal?
6. How are corporations guilty of crime?

CHAPTER XVIII.

1. (a) What three species of contracts are recognized? (b) What are the three different species of debts? (c) Is a judgment a contract? (d) What is a debt upon recognizance? By specialty?
2. What is a covenant and what is the remedy?
3. (a) For what kind of contracts is assumpsit the remedy? Illustrate. (b) What is the Statute of Frauds? (c) What five classes of contracts does it cover? (e) What contracts are expressed and what implied? (f) What are contracts implied in law as contrasted with those implied in fact? (g) Define consideration. (h) Are there any contracts valid and binding without any consideration or reciprocity?
4. (a) For what kind of demands only is debt the proper form or theory of action? (b) What remedy is available to recover an indeterminate sum of money due?
5. Is the foundation of the cause of action in debt a promise to pay? What is it?
6. When is covenant the proper form of action?
7. (a) What is the scope of the action of general assumpit? (b) What is the ultimate resort to enforce an obligation not covered by the theory of any other form of action?
8. (a) Name the five common counts in general assumpsit and describe what is covered by each. (b) Do the Common Counts ever lie to recover the proceeds of a tort?
9. (a) What was the scope of the old action of account? (b) What is the modern method of compelling a partner to account?

10. Can the assignee of a chose in action sue thereon in his own name at common law?
11. (a) What is a bill of exchange? (b) What is negotiability? (c) What are indorsement, presentation for acceptance and protest? (d) Must the drawee accept the draft to make himself liable?

CHAPTER XIX.

1. Trace the difference in the attitude of the common law toward real and personal property.
2. (a) What beside movables do things personal include? (b) Why are certain interests in land classified as personal rather than real property? (c) Were chattels the subject of feudal tenure?
3. (a) Distinguish between a chose in possession and a chose in action. (b) Why are debts, claims, and other incorporeal rights spoken of as being "in action?"

4–7. (a) What restrictions are imposed by law on the natural right to acquire title to animals ferae naturae by occupancy? (b) What jurisdiction or reason may be suggested for these restrictions?

8. (a) What is the "animus revertandi" and what is its effect? (b) If my bees escape what must I do to retain my title to them?
9. To whom does the increase of domestic animals belong and why?
10. (a) Does the finder acquire title to lost property as against the loser? (b) As against third persons? (c) What is the difference between lost and abandoned goods with reference to occupancy thereof?
11. What is treasure trove, and what are the rights of the finder thereof?
12. What is the law of wreck in its effect on the title of the owner and on the rights of the finder?
13. When does the former owner lose title to things stolen?
14. When does the owner forfeit title to estrays?
15. What is the reason of these royal prerogatives which limit the rights of an unfortunate owner or of a finder?
16. Has the author of a literary composition any property

therein at common law after publication? By statute only?
17–18. When is title transferred by accession and when by confusion? Discuss these titles.

CHAPTER XX.

1. (a) May there be a gift of chattels real? (b) How is a gift of chattels personal perfected?
2–3. When does title pass in an ordinary sale of specific goods?
4. What evidence of a contract of sale does the Statute of Frauds require?
5. What is market overt?
6. When do warranties arise upon a sale of goods?

CHAPTER XXI.

1. Define a bailment and give examples.
2. (a) Is a gratuitous depository liable for accidental loss? (b) What is the measure of his undertaking?
3. Explain how the letter and hirer, the borrower and lender, have qualified interests in the same chattel?
4. Can a bailee sue a third person who injures the goods bailed?
5. Can future interests be created in chattels and to what extent?
6. Can there be joint tenancy in chattels the same as in real property?

CHAPTER XXII.

1. (a) To what does the Law of Real Property relate? What is "Law" beside the surface of the soil? (b) What is indicated by the term "Tenement?" "Tenure?" (c) By the term "Hereditament?"
2. What is meant by the early communion of goods?
3. Trace the origin of individual ownership in animals and wells?
4. Describe how land was still open to occupancy in early times?
5. Trace the development of private property in land, and its consequences.

6. Why should occupancy confer an absolute property in land? How far does it still concern real property?
7. Is naked possession of land, taken by wrong, in any sense a title to hold possession against others?
8. When is title perfected by adverse possession?
9. Give examples of title by accretion as a result of alluvium or dereliction?

CHAPTER XXIII.

1. Describe some of the feudal restraints on alienation.
2. Enumerate various incapacities of some parties to convey land.
3. What are the different classes of conveyances?
4. What is feoffment? Was actual delivery of possession of the land necessary?

5–9. Distinguish conveyances by way of gift, grant, lease, exchange and partition.

10–14. Define release, confirmation, surrender, assignment and defeasance and give the operation of each.

15. Describe various conveyances operating under the Statute of Uses.

CHAPTER XXIV.

1. Distinguish an indenture from a deed poll.
2. Mention four requisites of a deed. For what purpose is it customary to recite a formal consideration?
3. Describe the eight formal parts of a deed.
4. (a) What formalities are essential to the due execution of a deed? (b) What is the importance of delivery?
5. Mention certain rules for the construction of deeds and wills.

CHAPTER XXV.

1. Is there any natural right or claim to take by descent or by will or to appoint successors by will?
2. What is title by testament, and what by administration?
3. What compulsory shares were given by the ancient law to the wife and children?
4. Trace the history of administration of interstate estates.
5. In what order are the kindred of the deceased entitled to the administration of his estate?

6. What is an executor de son tort?
7. (a) Describe the course of administration of an estate. (b) What is abatement of legacies? (c) What is a lapsed legacy? (d) Who is entitled to the residuum of the estate?
8. (a) What are in general the provisions of the Statute of Distributions? (b) What are advancements? (c) What is the difference between division per stirpes and division per capita?
9. Define a will.
10. What are the restrictions on nuncupative wills imposed by the English Statute of Frauds?
11. What are the formalities of execution of testaments under this statute?

12–13. (a) How may wills be revoked? (b) On what grounds may wills be set aside?

14. (a) What benefits or evils result from the power of devising land? (b) What reasons may be suggested for the early restraints?
15. How was the power to devise land introduced?
16. What formalities are required in executing wills of land?
17. Are legatees or creditors competent witnesses to wills of land?
18. Is a will of lands regarded by the law as a mere nomination of successors or as a species of conveyance?

19–20. What is the nature of lineal and collateral consanguinity?

21. Mention the common law canons of descent.
22. To what extent are bastards and aliens incapacitated to take by descent?
23. What are the requisites to enable a husband to take an interest in his wife's real estate as tenant by the courtesy on her death?
24. What interest does the wife take in her husband's real estate at his death by way of dower?
25. What is jointure and what are its essentials as a bar to dower?

CHAPTER XXVI.

1. What is an estate and what is the primary division of estates?

2. What are freehold estates, and how are they conveyed at common law?
3. What words are necessary to create a fee simple by deed?
4. Why is no absolute ownership of land recognized at common law by a subject, but only estates or interests therein?
5. Trace the evolution of estates in fee tail from *Conditional Fees.*
6. What are the species of estates tail?
7. How are estates tail created and how may the entail be barred?
8. By what words in a deed is an estate for life created?
9. What rights has a life tenant in the land with reference to timber crops planted by him?
10. What is waste by a tenant for life? Give examples.
11. Describe an *"estate tail after possibility of issue extinct."*
12. Why did a particular tenant forfeit his estate by purporting to convey a greater estate than he really held?
13. Why is an estate for years "less than a freehold," and classed as personal property only?
14. What is the difference between freeholder and lessee for years in respect of seisin?
15. Compare the incidents of tenancy for years with those of tenancy for life.
16. (a) What acts of lessor or lessee will terminate a tenancy at will? (b) What is the effect of construing a tenancy as being from *year to year* rather than at will?
17. Is a tenant wrongfully holding over a trespasser?

CHAPTER XXVII.

1-2. (a) How are joint tenancies created? (b) What are the four unities essential to a joint tenancy?
3. When one joint tenant dies, to whom does his interest or share go? Does his heir get it? Does it pass by will?
4. In what four ways may a joint tenancy be severed?
5. What are co-parceners?
6. (a) How is tenancy in common created? Give examples. (b) Does the doctrine of survivorship apply to tenant in common?

CHAPTER XXVIII.

1. (a) Give an example of an implied condition qualifying an estate. (b) Give examples of conditions precedent and subsequent.
2. Give examples of a limitation as distinguished from a condition subsequent.
3. If a condition subsequent be invalid, what is the effect upon the estate? What if a precedent condition be void?
4. What estate has a mortgagee in the mortgaged land?
5. What estate has a mortgagor in the land after default in payment and after the conditional estate of the mortgagee has become absolute at law?
6. Mention certain other security interests in land held under statute?

CHAPTER XXIX.

1. (a) What is alienation in mortmain? (b) What is the origin of uses?
2. Mention some characteristics of the interest of the cestui que use.
3. (a) What was the purpose of the Statute of Uses (1535)? (b) What was the effect of the Statute?
4. (a) What are springing and shifting uses? Give examples. (b) How could the grantor reserve a power of revocation to change beneficiaries?
5. Explain how uses were revived under the name of trusts in spite of the Statute.
6. Mention certain characteristics of equitable estates which are held through the mediums of a trust.

CHAPTER XXX.

1. Explain the term "incorporeal hereditament."
2. Mention four kinds of rights of common.
3. How may a right of way be acquired?
4. Was private property recognized by the common law in a public office?
5. How were franchises acquired in England?
6. What is the difference between an annuity and a rent charge?

CHAPTER XXXI.

1. Estates with regard to the time when the right of possession or enjoyment is to begin are of what two kinds?
2. (a) Give examples of the creation of valid remainders for life or in fee. (c) Why cannot a remainder be created in a grant of an estate in fee simple?
3. Why is a particular estate necessary to support a remainder?
4. When must the remainder be created?
5. When must it vest?
6. (a) What is the distinction between vested and contingent remainders? (b) Give examples.
7. How may contingent remainders be defeated and how preserved?
8. (a) In what three respects is an executory interest or devise free from the restrictions on remainders? (b) What is the rule against Perpetuities?
9. What is the reason for the careful distinction drawn by law between reversions and remainders?

CHAPTER XXXII.

1. Mention the different domestic and business relations.
2. Compare the essentials of entering into the marriage relation, with those of the formation of contract.

   Note.—Marriage is a continuing, personal relation with many obligations and incidents. It is not a contract though often called such.

3. What are the "canonical" disabilities which render a marriage voidable?
4. What are the civil disabilities which make an attempted marriage void?
5. Is any particular formality or ceremony required at common law to make marriage binding?
6. (a) In what two ways could marriage be dissolved? (b) what is the effect of each?
7. What are four effects of coverture on the capacity of the wife?
8. What is the effect of marriage on the wife's personal prop-

erty, leases, choses in action, and real estate, and what rights does the husband acquire in each?

9. What is the authority of the husband to chastise the wife?

CHAPTER XXXIII.

1–2. Have children a natural right to support from their parents?

3. May dependent children be disinherited by will under the civil law as by the common law?

4. How far does the common law enforce the natural duty of support and education?

5. What authority has a father over his son's property or services?

6. What are the duties, natural and legal, of children to their parents?

7. Compare the civil and common law as to legitimacy of children.

8. When has a child the choice of fathers?

9. What is the presumption as to legitimacy of children born of a married woman?

10. How may a putative father be compelled to support his bastard child.

11. From what incapacity does a bastard suffer as compared with a legitimate child?

12–13. What are the different species of guardians?

15. What are the incapacities and privileges of minors as to law suits, crimes, contracts and conveyances?

CHAPTER XXXIV.

1. What are extra-judicial remedies?

2. (a) To what extent does the law permit a man to use force in his own defense or that of his family? (b) What if excessive force be used?

3. What are the limitations on the right of recaption of chattels by force?

4. May an owner forceably retake possession of land from a trespasser?

5. Give examples of lawful abatement of a nuisance.

6. In what two cases did the common law allow a man to destrain chattels of a wrongdoer to compel satisfaction?
7. What is the remedy by accord and satisfaction?
8. By arbitration and award?
9. Explain how judicial and extra-judicial remedies are concurrent.
10. Define a judicial remedy by action in court.
11. What is the distinction between personal and real actions?
12. What is the period of limitation on ejectment under the Statute of James I? On personal actions?
13. What may be said in explanation of the uncertainty of legal proceedings?
14. What may be said in justification or excuse of the elaborate rules and methods of common law procedure?

CHAPTER XXXV.

1. What principle is embodied in the maxim, ubi jus, ibi remedium?
2. (a) What is an "attorney"? (b) What are barristers and sergeants?
3. How was the court of common pleas split off from the curia regis?
4. What is the jurisdiction of the court of King's Bench?
5–7. What is the jurisdiction of the Exchequer, Exchequer Chamber and House of Lords?
8. What are courts of assize and nisi prius?
9. Who is the Chancellor and what is his authority?
10. What was the jurisdiction of the Admiralty Courts?
11. What was the jurisdiction of the English Ecclesiastical Courts?

CHAPTER XXXVI.

1–2. (a) What was the first step in commencing an action under the old common law procedure? (b) What was the nature of the *original* writ and what was its importance?
3. What is original process?
4. (a) What is meant by the pleadings? (b) By the declaration? (c) When may a fictitious Venue be alleged? (d) What is the object of setting up the same cause of action in several counts in the same declaration?

5. What is the difference in effect between dismissal by nonsuit and retraxit?
6. (a) Give examples of three sorts of dilatory pleas. (b) What is the effect of the death of a party, and how is it raised?
7. (a) What is the object of tender or of paying money into court? (b) What is set-off?
8. (a) What is the general issue? (b) Give examples of special pleas "in bar."
9. Name the alternating pleadings subsequent to the declaration at common law.

11–13. (a) What is a general and what a special demurrer? (b) What is an issue of fact?

CHAPTER XXXVII.

1. How is the jury summoned and by whom selected?
2. What is the difference between transitory and local actions as to change of venue?
3. Point out certain advantages of the provisions as to jury trial.
4. (a) What are grounds or causes of challenge to the array? (b) What is the difference between a principal challenge, and one "to the favour"?
5. What is the order of procedure in hearing the case?
6. (a) What is the best evidence rule? (b) Name certain exceptions to the rule excluding hearsay.
7. (a) What witnesses were incompetent to testify at common law? (b) How many witnesses are required to prove a fact?
8. Contrast public oral examination of witnesses with the method of taking depositions on written questions.
10. What happens after the evidence is closed?
11. Describe a rendition of a privy verdict, a special verdict, a general verdict on a special case.

CHAPTER XXXVIII.

1. What is a postea?
2. (a) What are the principal grounds for setting aside a verdict and for granting a new trial? (b) How is it ap-

plied for? (c) Is it granted as of course? (d) In what ways is it discretionary?

3. For what causes may the losing party move in arrest of judgment?
4. Did the losing party in a civil suit have to pay a fine to the King at common law?
5. (a) To whom are writs of execution directed? (b) What writs of execution issue against the person of the defendant? (c) Against his personal property? (d) Against his real property? (e) Within what time must execution be taken out?
6. (a) What are the grounds for a writ of error and what does it review? (b) What is a bill of exceptions?

CHAPTER XXXIX.

1. What is the origin of the dual system of law and equity?
2. What hampered the extension of remedies to do complete justice in the law courts?
3. Trace the establishment of a separate equity jurisdiction.
4. (a) What is *equity* in the technical sense? (b) Is it corrective of a merely supplementary and additional to law?
5. Does equity follow different rules of construction or interpretation from law?
6. Are fraud, accident and trust peculiar topics of equity jurisdiction?
7. Does equity follow precedents like law?
8. Is equity really a part of the legal system?
9. Illustrate the general similarity of rules at law and in equity.
10. Wherein does the difference between law and equity consist?
11. Mention five grounds or sources of equity jurisdiction.
12. (a) In what sense is equity a science? (b) Has an equity judge arbitrary discretion to do justice as he pleases?

CHAPTER XL.

1. Mention certain requisites of a bill in equity.
2. When will a temporary injunction be granted?
3. (a) How is appearance of the defendant compelled? (b) When may a bill be taken pro confesso?

4. (a) What pleadings may defendant put in? (b) Answers must be made with what formalities?
5. (a) What is a bill of revivor? (b) A bill of interpleader?
6. What is the alternative to a reply by the plaintiff?
7. How is testimony taken in equity?
8. What is the order of trial in an equity suit?
9. Compare decrees to judgments at law.
10. What sorts of questions are usually referred to the law courts?
11. How are accounts settled in equity?
12. What is the method of new trial and review in equity?

CHAPTER XLI.

1. When may the writ of mandamus be obtained, and how?
2. When may the writ of prohibition be had? (b) What is the procedure?
3. What is the civil use of an information, as contrasted with the criminal use?
4. What is the writ of quo warranto?
5. What is the policy of the bankruptcy laws?

CHAPTER XLII.

1. Mention the old English courts of criminal jurisdiction.
2. Who were conservators of the peace at common law?
3. What is the authority of justices of the peace?
4. What is the authority of the sheriff?
5. Of the coroner?
6. Of constables?

7–10. Describe the process of binding offenders to keep the peace, and how it operates.

CHAPTER XLIII.

1–2. (a) When may a justice of the peace issue a warrant of arrest?
3. What is the difference in the authority of peace officers and of private citizens in making arrests without warrant upon probable suspicion?
4. What is the next step after the arrest of the accused person?

5. When is the accused person to be committed to prison and when admitted to bail?
6. (a) What is the nature of an indictment? (b) How is it found?
7. Enumerate a list of matters which the indictment must set forth with certainty.
9. When may there be prosecution by information without indictment?
10. What is the arraignment?
11. What is done if the demurrer of the prisoner is overruled?
12. Mention three special, affirmative pleas in bar.
13. What defenses may be shown under the general issue, "not guilty"?
14. How many peremptory challenges were allowed the prisoner? Why?
15–16. In what cases does the law absolutely require two witnesses to convict?
17. What is a special verdict?
19. When may the prosecution be compromised?
20–21. How may judgment be arrested or reversed?
22. Compare Reprieves and Pardons.

CHAPTER XLIV.

1. (a) Define a state. (b) What is the social compact theory?
2. Who is entitled to govern, theoretically?
3. What are sovereignty and sovereign power?
4. What are the three forms of government, and what are their respective merits?
5. Where is the sovereignty lodged under the British constitution?
6. What were three forms of colonial government?
7. What were the local subdivisions of England?

CHAPTER XLV.

1. From what is the tie of allegiance derived?
2. Why does every subject owe allegiance even without an oath?
3. Can nationality or natural allegiance be put off according to English theory?

4. How can an alien owe allegiance, and to what extent?
5. What are the disabilities of aliens?
6. Are children of citizens, if born abroad, aliens at common law?
7. What is a denizen?

CHAPTER XLVI.

1. Distinguish private liberty and public or civil liberty.
2. Does governmental restraint diminish or increase civil liberty? When?
3. (a) Enumerate the great English documents declaring civil rights. (b) What are civil rights?
4. What is the right of personal security and by what governmental power is it qualified?
5. By what English statutes is the right of personal liberty safe-guarded?
6. What is Habeas Corpus, and what is its importance?
7. When may the writ of Habeas Corpus be suspended in England, and by whom?
8. What abuses arose in England as to the causes of imprisonment sufficient to make a valid order of commitment to prison?
9. What does the Habeas Corpus act enact?
10. Has the king the power of banishment or exile? Has parliament?
11. Is liberty of the press consistent with the punishment of libels and other offensive publications?
12. In what does the right of property consist considered as a civil right?
13. (a) How far is the right of property absolute and how far is it qualified by governmental power? (b) What is eminent domain?
14. In what sense are taxes imposed only by consent?
15. What is the justification of inflicting forfeitures for crime?
16. Mention certain auxiliary rights securing civil liberty.
17. How is trial by jury a bulwark of liberty?
18. What is the right to petition restricted by?
20. How are the rights of the subject protected against the

government when it is law that the king or government cannot be sued?

21. Is there such a thing as a right of rebellion or revolution?

CHAPTER XLVII.

1. Why should citizens elect representatives instead of legislating and governing directly as in a pure democracy?
2. Who do members of parliament represent?
3. What reasons may be given for requiring property qualifications of voters?
4. What are the constituent parts of parliament in theory?
5. What is the great privilege of the House of Commons through which the right of the people to participate in the government of the country was largely won?
6. How extensive has the power of parliament come to be?
7. Can parliament pass an irrepealable act which will tie the hand of succeeding legislatures?
8. Are impossible acts void? How about unreasonable acts?
9. Describe the checks and balances which theoretically existed in the English government of Blackstone's day.
10. Explain the war power.
11. Mention three powers of internal administration exercised by the King.
12. What was the military organization of the feudal system?
13. (a) What is military law? (b) Who makes and administers it? (c) Compare the situation of a soldier in the army with that of seamen in the navy as to discipline.
14. Has the King power to issue proclamations with the force of law? Illustrate.
15. Are the executive powers absolute in their nature?
16. (a) Explain how the judicial department of government separated and was evolved from the executive. (b) Why is it important to have distinct and co-ordinate departments of government?
17. Make a list or outline of the principal topics covered in this survey of the great structure of the English common law.

CUMULATIVE INDEX

EXPLANATORY NOTE

The best index in the world may be entirely valueless because it is not used intelligently. Before undertaking to use the Cumulative Index the reader is asked to consider carefully the following explanatory matter of the plan and theory of the Index.

This is a Cumulative Index: it includes all the references which are given in the indexes provided in each separate volume. The same general arrangement is followed here as is followed in the separate volume indexes. The general titles are in black face type, as "**Abandonment,**" "**Absentee.**" The subheads are in light face type.

Ordinary titles in common use and readily occurring to the reader's mind have been adopted. Where different titles covering the same thought are common a suitable cross reference has been made. Latin phrases and maxims are included in the index, providing a ready means to learn their meaning.

All titles and subtitles are arranged in alphabetical order, with the exception of "defined," which is always given first. Citations are both to volume and to page. The volume references are set in Roman numerals; the page references are in Arabic figures.

All references are to the figures at the foot of the pages of the several volumes.

First look alphabetically in the black face titles of the index for the general subject in which you are interested. Under this head, in light face type, the particular phase of the subject will be found, with citations to all places in the set where the subject is treated. If you do not find the matter under the first black face title you consult, try several others. A point may often be appropriately indexed under any one of several titles.

A few tests in the use of the index will readily make one familiar with its working power. It is particularly suited for emergency reference. Continued use of the index will open a practicable method for quickly, easily and thoroughly obtaining governing rules on all branches of the law.

CUMULATIVE INDEX

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(See page 521 for directions.)

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